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U.S. DISTRICT COURT
DISTRICT OF MASS.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,
Plaintiff,

v.

NEW SEABURY CORP., et al.,
Defendants.

DOCKETED

CIVIL ACTION NO. 76-3190-S

OPPOSITION TO PLAINTIFF'S MOTION
FOR CLASS CERTIFICATION

Defendant New Bedford Gas & Edison Light Co. ("New Bedford") hereby opposes the Plaintiff's Motion for Class Certification for the following reasons:

1. Defendant New Bedford is a public utility corporation regulated by the Massachusetts Department of Public Utilities and owner of real property and rights-of-way over land claimed by the plaintiffs. The defendant public utility supplies electrical energy not only to persons in the Town of Mashpee but to citizens and residents in other cities and towns in this Commonwealth. Any decision of this court affecting the interests of defendant New Bedford will affect the interests of the rate payers and users of electrical energy located outside of the Town of Mashpee whose interests are not represented in this proceeding except by defendant New Bedford.
2. Defendant New Bedford is a subsidiary of New England Gas & Electric Association., a Massachusetts business trust whose shares are listed and traded on the New York Stock Exchange, New Bedford's debt securities are owned by persons, firms and corporations located

outside of the Town of Mashpee, and except for the representation by New Bedford the interests of such persons will be unrepresented in this action.

3. The interests of New Bedford, its rate payers, customers, its parent association, the stockholders of its parent, and the interests of New Bedford itself, a regulated public utility corporation, cannot adequately be represented by including New Bedford in the proposed defendant class.

4. Defendant New Bedford's duty to its customers, its rate payers, its debt security holders and the stockholders of its parent association cannot be properly discharged by including New Bedford as a member of the proposed class of defendants.

5. Defendant New Bedford should be entitled to assert on its own behalf and on behalf of those interested persons herein referred to, every special defense available to it as a public utility and not be included in the proposed defendants class.

Wherefore, it is respectfully requested that the motion of the plaintiff Mashpee Tribe for class certification, dated October 18, 1976, be denied with respect to defendant New Bedford Gas & Edison Light Co.

By its attorneys,



Edwin J. Carr, Esquire
May, Bilodeau, Dondis & Landergan
294 Washington Street
Boston, Massachusetts 02108
(617) 482-1360

Dated: December 14, 1976

CERTIFICATE OF SERVICE

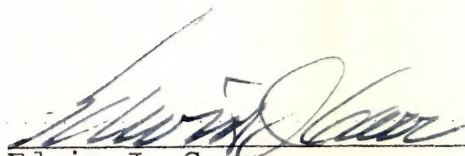
I, Edwin J. Carr, attorney for defendant New Bedford Gas & Edison Light Co., hereby certify that on December 14, 1976 I served a copy of the within Opposition to Plaintiff's Motion for Class Certification by mailing on said date a copy thereof, first class mail, postage prepaid, to each of the following:

Plaintiff's Counsel of Record:
Barry A. Margolin
Native American Rights Fund
364 Boylston Street, 2nd floor
Boston, Massachusetts 02116

Stephen H. Oleskey
Hale & Dorr
28 State Street
Boston, Massachusetts 02109

Morris Kirsner
89 State Street
Boston, Massachusetts 02109

Dated: December 14, 1976


Edwin J. Carr

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DISTRICT COURT
DISTRICT OF MASS.

MASHPEE TRIBE,

Plaintiff,

v.

NEW SEABURY CORP., et al.,

Defendants.

CIVIL ACTION NO. 76-3190-S

DOCKETED

OPPOSITION TO DEFENDANT
GREENWOOD DEVELOPMENT CORP.'S
MOTION TO APPOINT CLASS REPRESENTATIVE

Defendants New Bedford Gas & Edison Light Co. and John P. Condon Corp. hereby oppose the motion of defendant Greenwood Development Corp. to appoint Thomas B. Shea as attorney to represent the defendant class.

Dated: December 15, 1976
Boston, Massachusetts



Edwin J. Carr
294 Washington Street
Boston, Massachusetts 02109
(617) 482-1360

Attorney for Defendants
New Bedford Gas & Edison Light Co.
John P. Condon Corp.

CERTIFICATE OF SERVICE

I, Edwin J. Carr, attorney for defendants New Bedford Gas & Edison Light Co. and John P. Condon Corp., hereby certify that on December 15, 1976 I served a copy of the within Opposition to Defendant Greenwood Development Corp's Motion to Appoint Class Representative, by mailing on said date a copy thereof, first class mail, postage prepaid, to each of the following:


Plaintiff's counsel of record:
Barry A. Margolin
Native American Rights Fund
364 Boylston Street, 2nd floor
Boston, Massachusetts 02116

Thomas B. Shea
Gargiulo & Holian
678 Massachusetts Avenue
Cambridge, Massachusetts 02139

Stephen H. Oleskey
Hale & Dorr
28 State Street
Boston, Massachusetts 02109

Morris Kirsner
89 State Street
Boston, Massachusetts 02109

Dated: December 15, 1976
Boston, Massachusetts


Edwin J. Carr

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FILED
IN CLERK'S OFFICE
DEC 13 11 26 AM '76

DISTRICT COURT
DISTRICT OF MASS.
DOCKETED

MASHPEE TRIBE,

PLAINTIFF

VS.

NEW SEABURY CORP., et al.,

DEFENDANTS

CIVIL ACTION NO. 76-3190-S

INTERROGATORIES PROPOUNDED BY THE DEFENDANT, GREENWOOD
DEVELOPMENT CORPORATION, TO BE ANSWERED UNDER OATH
BY THE PLAINTIFF

1. State the name, home address and occupation of the official of plaintiff answering these interrogatories?
2. Set forth in full the record of the meeting at which answering official was elected, chosen, or designated as such official, including the designation of the constituent body, the names and addresses, and office held, if any, of persons present at such meeting?
3. Set forth the most recent available membership list of Mashpee-Wamponoag Indian Tribal Council, Inc., stating the number of members, name, home address, and occupation of each member, and state names and official position of all officers of such council?
4. As nearly as can be presently calculated, either by

actual count or by reasonable estimate, state the number of persons intended by plaintiff to have an interest in the land which is the subject of this Complaint if the same be successful; and state the name and address of each such person, in the case of minors, giving the family group, children of named mother and father, etc. and number?

5. State the tribal membership or affiliation of each such person, whether "Mashpee," "Wamponoag," or other, and state whether or not such membership or affiliation is a matter of any tribal record, and if so, when and by whom was such record established, where is the same kept; and when, giving date, was such person enrolled on such record?

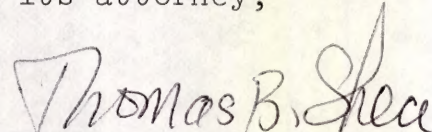
6. If the Complaint succeeds, does plaintiff intend or claim that any person who is a descendant of one or more of the proprietors of Mashpee lands, or claiming an interest by inheritance gift or devise from such proprietor shall have an interest in the land which is the subject of this Complaint? In answering this question, it is to be understood that for purposes of this interrogatory, proprietor of Mashpee lands means a person, or family group, such as heirs, identified in Mashpee Town Records, Books 1 and 2, compiled by Commissioners of District of Mashpee, pursuant to Chapter 72, Acts of 1842, Commonwealth of Massachusetts and by Selectmen of the Town of Mashpee, as persons owning identified, described tracts of lands in severalty and as persons to whom portions of common lands of Mashpee were set off according to statute, Chapter 293, Acts of 1870, Commonwealth of Massachusetts.

7. If plaintiff does so contend in answer to number 6, state the name and address of each such person?

And, so far as may be calculated or reasonably estimated, state the fractional interest of such person?

8. If Complaint No. 76-3190-S succeeds, does plaintiff intend or claim that any person or family group not a descendant of a proprietor of Mashpee as defined in No. 6 above, shall have an interest in the land which is the subject of this Complaint by reason solely of a judgment for complainant, and if so, state the number of such persons, the names and addresses of such persons, and so far as may be calculated or reasonably estimated, the fractional interest of each such person?

GREENWOOD DEVELOPMENT CORPORATION
By its attorney,



THOMAS B. SHEA
678 Massachusetts Avenue
Cambridge, MA 02139
Telephone: 868-7444

CERTIFICATE OF SERVICE

I, Thomas B. Shea, attorney for the defendant, Greenwood Development Corporation, hereby certify that I caused a copy of the within Interrogatories to be served on the plaintiff, by mailing, postage pre-paid, to Barry A. Margolin, Esq., Native American Rights Fund, 364 Boylston Street, 2nd Floor, Boston, Massachusetts 02116.

Thomas B. Shea

THOMAS B. SHEA
Attorney for Greenwood
Development Corporation
678 Massachusetts Avenue
Cambridge, MA 02139
Telephone: 868-7444

GARGIULO & HOLIAN
ATTORNEYS AT LAW

ANTHONY P. GARGIULO
PAUL G. HOLIAN

CENTRAL SQUARE BUILDING
678 MASSACHUSETTS AVENUE
CAMBRIDGE, MASSACHUSETTS 02139
868-7444

December 10, 1976

United States District Court
for The District of Massachusetts
U.S. Post Office and Courthouse Bldg.
Boston, MA 02109

Re: Mashpee Tribe
Vs: New Seabury Corp., et al
Civil Action No. 76-3190-S

Dear Sir or Madam:

Enclosed please find Interrogatories Propounded by the
Defendant, Greenwood Development Corporation, to be
Answered by the Plaintiff.

Please file and docket same.

Very truly yours,

Thomas B. Shea
THOMAS B. SHEA

TBS/pvc
Enclosure

cc Barry A. Margolin, Esq.
Native American Rights Fund
364 Boylston Street
2nd Floor
Boston, Mass. 02116

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

18 JURY OFFICE
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U.S. DISTRICT COURT
DISTRICT OF MASS.

* * * * *

MASHPEE TRIBE,

Plaintiff

v.

TOWN OF MASHPEE, ET AL

Defendants

CIVIL ACTION
No. 76-3190-S

* * * * *

DOCKETED

MEMORANDUM IN REPLY TO PLAINTIFF'S
MEMORANDUM IN OPPOSITION TO THE TOWN
OF MASHPEE'S MOTION TO DISMISS

I. INTRODUCTION

On October 22, 1976, the Town of Mashpee filed a motion to dismiss the plaintiff's claim on three separate grounds. Specifically, these grounds were the failure of the complaint to state a cause of action, Fed. R. Civ. P. 12(b)(6); failure to join the United States as an indispensable party plaintiff, Fed. R. Civ. P. 12(b)(7) and Fed. R. Civ. P. 19; and failure to join the Commonwealth of Massachusetts as an indispensable party plaintiff. Fed. R. Civ. P. 12(b)(7) and Fed. R. Civ. P. 19. A memorandum in support of that motion to dismiss was filed that same day (hereinafter "Town's Memo").

Plaintiff responded on November 17, 1976 with a memorandum in opposition to the motion to dismiss (hereinafter

"Plaintiff's Memo"). Pursuant to defendants' request for leave to file a reply memorandum, filed on December 1, 1976, the defendants reply to certain contentions made in Plaintiff's Memo.

II. ARGUMENT

A. THE COMPLAINT DOES NOT ALLEGE THE REQUISITE FEDERAL RECOGNITION AND, THEREFORE, FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Plaintiff's suggestion that the opinion of the district court in Narragansett Tribe of Indians v. Southern Rhode Island Development Corp., 418 F. Supp. 798 (D.R.I. 1976) (hereinafter "Narragansett") forecloses the issue of federal recognition raised by this motion should be rejected. The court in Narragansett clearly relied upon and felt bound by the First Circuit's opinion in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F. 2d 370 (1st Cir. 1975), aff'g 388 F. Supp. 649 (D. Me. 1975) (hereinafter "Passamaquoddy"). 418 F. Supp. at 815-16 n. 3. By presuming that the Passamaquoddy court had determined all conditions precedent to suit, the Narragansett court was compelled to decide on behalf of the tribe. In so doing, the court failed to recognize that the distinction between legal tribal existence and status as a "tribe" as that term is used in the Nonintercourse Act was not before the court in Passamaquoddy. The Narragansett court's failure to adopt the proper analytical framework is best evidenced by its reliance on the definition of "tribe" set forth in Montoya v. United States, 180 U.S. 261, 266 (1901), to establish the judicially manageable standards for resolution which would characterize a nonpolitical

controversy. 478 F. Supp. at 815 (Plaintiff's Memo at 9-10). In fact, the narrow issue decided by the Montoya court was whether the Pueblos constituted a "tribe" as that term was used in section one of the Act of March 3, 1891, c. 538. The sole issue, therefore, was, as in the case of Passamaquoddy, one of statutory construction, a function the defendants concede to be within the judicial power. The Montoya court did not, however, consider whether judicially manageable standards for determination of tribal status in the legal and political sense were available.

Moreover, the interpretation of Passamaquoddy made by the Narragansett court ignores the essentially sovereign character of Indian nations; for the real basis and justification for treating Indian tribes separately and specially was their legally and politically independent existence. Worcester v. Georgia, 31 U.S. (6 Pet.) 556-57 (1832). The defendants do not contend that this special sovereign status requires treatment identical to that given sovereign foreign nations.¹ Rather, only certain principles of international law apply to Indian tribes; one of which is the requirement that an alleged sovereign demonstrate prior political recognition before gaining access to the federal courts. The Penza, 277 F. 91, 92-94 (1921). Without this requirement of a threshold political judgment, the unique

¹The case of Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831), cited by the plaintiff for the proposition that Indian nations and foreign nations are "entirely different", held only that an Indian nation was not a "foreign state" under the provision of the Constitution giving the Supreme Court original jurisdiction in suits between a state of the United States and a foreign state. The general applicability of international legal principles to Indian nations was not discussed.

control over Indian affairs given to the Congress by the Constitution would be lost.

The defendants' reliance on United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F. 2d 676 (6th Cir. 1975) cert. denied, 423 U.S. 1086 (1976) (hereinafter "Washington"), to support its motion can be shown to be justifiable rather than "remarkable"; (Plaintiff's Memo at 8); for that court clearly felt it necessary to find the requisite federal recognition:

[T]his court has found and held...that each of plaintiff tribes in this case... has established its status as an Indian tribe recognized as such by the federal government and therefore is entitled to maintain this action...

384 F. Supp. at 339. That decision recognized that, absent federal recognition, the only alternative judicially cognizable status is that of a "treaty tribe". Congressional designation as such would allow a tribe, otherwise without federal recognition, to seek enforcement of those rights to which it is entitled under the treaty. Further, as evidenced by the passage quoted in Town's Memo at 6, the question of treaty tribe status is likewise a nonjusticiable political question and is consequently reserved to the unfettered discretion of Congress. 384 F. Supp. at 400.

The passage from Washington quoted by the plaintiff as standing for the proposition that this Court is capable of adjudicating plaintiff's tribal status is inapposite (Plaintiff's Memo at 9). In fact, that passage buttresses the two tier tribal

status test, for it reserves to the courts only the issue of factual, as opposed to legal, existence. Moreover, the opinion in its entirety demonstrates that, in the first instance, a group of Indians must establish some federal political recognition as a treaty tribe or otherwise. Assuming they can satisfy this condition precedent without requiring the court to adjudicate a nonjusticiable question, the court may then properly proceed to the factual issue of whether the particular tribe is within the coverage of a given statute. Defendants have not claimed that this latter factual issue is not capable of judicial resolution.

The plaintiff urges that if this court determines that federal recognition is a prerequisite to suit, the plaintiff is entitled to prove its "allegation of tribal status" (Plaintiff's Memo at 11). However, the only relevant allegations in the Complaint concern the alleged tribe's status as the term "tribe" is used in the Nonintercourse Act. Proof of these allegations would not establish the necessary federal recognition and, therefore, absent some claim by the plaintiff of federal recognition, which it intends to support at trial, the Complaint should be dismissed.

B. THE UNITED STATES IS AN INDISPENSABLE PARTY WHOSE ABSENCE REQUIRES DISMISSAL.

1. The United States has waived its sovereign immunity.

Plaintiff contends that the defendants have asked this Court to extend the holding of United States v. Phillips, 362 F. Supp. 462 (D. Neb. 1973) ("Phillips"); this suggestion, however, ignores the explicit language of that case. The court did not limit its rationale to only those instances

in which "the government has voluntarily chosen to litigate its claim of title" (Plaintiff's Memo at 15). Instead, after holding that the statutory waiver of 28 U.S.C. §2409(a) (1976) did not apply when the restricted or trust nature of the land was in dispute, the court went on to state that the procedural context in which the claim was disputed is irrelevant. 362 F. Supp. at 463. Hence, although section 2409(a) speaks in terms of the United States as a "party defendant", the defendants may properly raise their claim against the United States by a motion made pursuant to Fed. R. Civ. P. 12(b)(7) and Fed. R. Civ. P. 19. Any other approach "would be contra to the purpose of the Federal Rules of Civil Procedure and would not aid the 'just, speedy, and inexpensive determination of every action'..." 362 F. Supp. at 463.

Even if this Court were to hold section 2409(a) to be applicable to suits where the Indian claim is in dispute, the plaintiff has failed to establish that aboriginal title claims are within the "restricted or trust land" exception to that statutory waiver. In United States v. Bowling, 256 U.S. 484, 487 (1921), cited by the plaintiff as distinguishing restricted land from trust land, (Plaintiff's Memo at 13), the court compared the trust patent, allowing the United States to hold land in trust for a given group of Indians for a designated period, with a restricted patent, a conveyance in fee to Indians with a restriction on alienation for a stated period. 256 U.S. at 486-87. These are precisely the situations which Congress intended to exempt from section 2409(a); for, as demonstrated

by the Interior Department's report to the Senate, the purpose of the Indian land exception was to isolate and protect the "specific commitments to the Indian people through written treaties and through informal and formal agreements." 1972 U.S. Code Cong. and Admin. News 4547, 4557 (emphasis added). It was not intended that this well delineated exception from the statutory waiver apply except where the United States acted affirmatively to protect, either by trust or restriction, certain defined parcels or tracts of Indian land. The patents in Bowling, therefore, would have been within the exception; the aboriginal title claim of the plaintiff is not. The United States has waived its sovereign immunity on these facts and its joinder, consequently, may be ordered.

2. Plaintiff has an adequate alternative remedy if this action is dismissed.

Plaintiff's interpretation of Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973), denies the scope of the remedy suggested in that case. It was that court's intention to provide Indians holding aboriginal title with an adequate remedy if the United States chose to extinguish that interest without compensation. See, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). To minimize the impact of such an uncompensable action, Edwardsen provides a substantial alternative. It was not necessarily limited to suits against private third parties; but rather, as stated by one commentator, was

unique...substantively, in acknowledging a legally protected interest against the Government's breach of its obligation to protect Indian title lands from third party interference without reference to

any particular treaty or statute...[I]t is now possible to sue and recover against the Government for its failure to protect land from interference by others...

Note, Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial, 1975 Colum. L. Rev. 656, 685-86 (emphasis added). Moreover, a significant damage award against the United States would place the burden of compensating for any wrongdoing upon the breaching fiduciary rather than innocent third parties holding valid interests under state law. Such a remedy, therefore, would be both equitable and materially adequate.

C. THE COMMONWEALTH IS AN INDISPENSABLE THIRD PARTY WHOSE ABSENCE REQUIRES DISMISSAL.

1. The Commonwealth has sufficient interest to require its joinder.

Although the plaintiff concedes that the Commonwealth originally possessed a pre-emptive right known as the "ultimate fee", it contends that the Commonwealth has divested itself of that residuary fee and, therefore, does not have an interest in this litigation sufficient to require joinder (Plaintiff's Memo at 21-24). Specifically, the plaintiff notes the lack of any evidence that the state possesses or claims any property rights.

All that the defendants must show to require joinder, however, is that, as a matter of law, successful prosecution of the plaintiff's claim would result in a tripartite division of the absolute fee and that the Commonwealth might assert one of the resulting interests. Such an interest on the part of Massachusetts, as one of the original thirteen colonies, was clearly delineated by the Supreme Court in Oneida Indian Nation

of New York v. County of Oneida, 414 U.S. 661, 670 (1974).

Absent an allegation in the complaint by the plaintiff that the Commonwealth had divested its interest, it is not incumbent upon the defendants to support their motion with evidence that the Commonwealth did not subsequently divest itself of the ultimate fee (Plaintiff's Memo at 23). Similarly, it is not the defendants' burden to produce proof that the Commonwealth has claimed a property interest in the land at issue (Plaintiff's Memo at 24). The fact that a claim of right is not a necessary element is best demonstrated by the plaintiff's concession that, although the United States has not yet asserted any title interest, it is possessed of the right to extinguish plaintiff's right of occupancy (Plaintiff's Memo at 21).

Further, the suggestion that the pre-emptive right of the Commonwealth and the plaintiff's claim of aboriginal title present completely separate legal and factual issues should be rejected. The transactions and occurrences which allegedly gave rise to the plaintiff's right of occupancy are precisely the same which would establish the Commonwealth's residuary fee. These events either resulted in both aboriginal title and an ultimate fee, or they did not. The two claims, therefore, present the same factual issues and should be joined accordingly. To fail to order joinder would be to deny the defendants the opportunity to obtain the complete relief mandated by Fed. R. Civ. P. 19.

2. The Commonwealth has waived its sovereign immunity.

The plaintiff properly notes that Mass. Gen. Laws c. 237, §2 (1976) provides for a statutory waiver of

sovereign immunity only when a freehold or similar estate is claimed (Plaintiff's Memo at 25). By moving to join the Commonwealth as a party plaintiff pursuant to Fed. R. Civ. P. 12(b)(7) and Fed. R. Civ. P. 19, the defendants seek to assert just such an interest. An order compelling joinder of the United States and the Commonwealth, as plaintiffs, would require that all those who might claim, by operation of the Nonintercourse Act, an interest contrary to that of the defendants, determine the extent and validity of their claims in a single suit. In this manner, the defendants would be able to obtain judicial confirmation of their freehold estates. The fact that the plaintiff asserts only a right of occupancy, which is presumably something less than a freehold estate, is irrelevant for it is only the defendants' asserted interests which are placed in issue by this Fed. R. Civ. P. 12(b)(7) and Fed. R. Civ. P. 19 motion (Plaintiff's Memo at 25).

Plaintiff also contends that the "under this Chapter" language of Mass. Gen. Laws c. 237, §2 (1976) precludes joinder of the Commonwealth because it "may limit the consent to actions brought in state court..." (Plaintiff's Memo at 25). The only relevant requirement in chapter 237, however, is that the recovery of the estate be sought in a civil action; Mass. Gen. Laws c. 237, §1 (1976); and there can be little doubt that this is such a suit. There is no indication either in the legislative history, or the language of the statute itself, that the statutory waiver of chapter 237, section 2 is limited only to civil suits in state court.

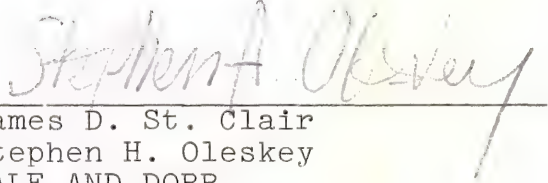
Moreover, the context in which the claim is asserted is irrelevant. This fact is best evidenced by the 1973 amendment to section 1 which substituted "may be recovered in a civil action" for "may be recovered by a writ of entry." Mass. St. 1973, c. 1114, §227. The purpose of this amendment was to inject the spirit and letter of the new Massachusetts Rules of Civil Procedure into the Commonwealth's statutory waiver of immunity. The former language implicitly required the initiation of suit by the claimant. The present statute, on the other hand, eliminates this constraint and would seem to allow a freehold estate to be asserted against the Commonwealth in any procedural manner which leads to the "just, speedy and inexpensive determination of that action. Fed. R. Civ. P. 1; Mass. R. Civ. P. 1. This Court, therefore, may order joinder of the Commonwealth so that a complete and final adjudication of the validity of the defendants' freehold interests may be made.

III. CONCLUSION

The defendants respectfully request that this Court grant their Motion to Dismiss on all grounds.

Respectfully submitted,

TOWN OF MASHPEE, MAURICE A.
COOPER and JOHN D. FERGUSON,
ET AL
By their attorneys,


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NEW SEABURY CORP.
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CO., INC.
FIELDS POINT MANUFACTURING
CORPORATION
By their attorneys,

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Lands, a Massachusetts Limited
Partnership
By their attorneys,

Thomas Otis

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JOHN R. BUNTING, ET AL
AS TRUSTEES OF FIRST PENNSYLVANIA
MORTGAGE TRUST
By their attorneys,

Thomas V. Urmey, Jr.

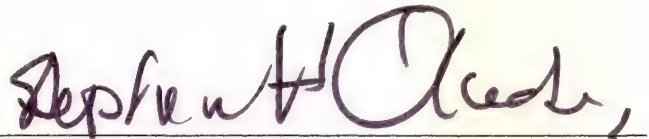
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(617) 523-6250

CERTIFICATE OF SERVICE

I, Stephen H. Oleskey, one of the attorneys for the defendant Town of Mashpee, hereby certify that on the 8th day of December, 1976, I caused copies of the within Memorandum in Reply to Plaintiff's Memorandum in Opposition to the Town of Mashpee's Motion to Dismiss to be deposited, postage prepaid, in the United States Mail, addressed to:

1. Barry A. Margolin, Esq., Native American Rights Fund, 364 Boylston St., 2nd Floor, Boston, Mass. 02116
2. Edwin J. Carr, Esq., May, Bilodeau, Dondis & Landergan 294 Washington Street, Boston, Mass. 02108
3. Paul H. Fitzgerald, Esq., 60 Batterymarch Street, Room 1235, Boston, Mass. 02110
4. Edward W. Kirk, Esq., Hunziker, McDermott & Kirk, 131 Main Street, Falmouth, Mass. 02541
5. Eunice B. Jones, Martha E. Jones, 4 Garfield Street, Natick, Mass.
6. Carol B. Jones, 1959 Commonwealth Ave., Brighton, Mass.
7. Clara L. Currier, 34 Linden St., Lawrence, Mass.
8. Alan A. Green, 171 Main St., P.O. Box 148, Hyannis, Mass. 02601
9. Clinton W. Lee, 311 Boston Post Rd., Wayland, Mass 01778
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12. Thomas B. Shea, Esq., Gargiulo & Holian, 678 Mass. Avenue, Cambridge, Mass. 02139
13. Benjamin Nesson, Esq., 85 Devonshire St., Boston, Mass. 02109
14. Frederick R. H. Witherby, Esq., 501 Boylston Street, Boston, Mass. 02117
15. Edward J. Hart, Esq., Curtis, Hart & Zaklukiewicz, 124 North Merrick Ave., Merrick, N.Y. 11566
16. John F. Dunn, Esq., 27 School St., Boston, Mass. 02108
17. Ira A. Nagel, Esq., Pike, Pike & Nagel, 18 Tremont St., Boston, Mass. 02108
18. Henry W. Keyes, Esq., Spencer & Stone, 50 Beacon St., Boston, Mass. 02108
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20. Susan Kagan Lange, M. Frederick Pritzker, Esq., Brown, Rudnick, Freed & Gesmer, 85 Devonshire St., Boston, Mass. 02109
21. William E. Crowell Jr., Esq., 49 Elm St., Hyannis, Mass. 02601
22. A. Russell Lucid Jr., Esq., Lucid & Lucid, 94 Washington St., Weymouth, Mass. 02188

23. Haskell Shapiro, Esq., 1 Court St., Boston, Mass. 02108
24. Donald F. Henderson, Esq., 776 Main St., Hyannis, Mass. 02601
25. Charles D. Kelley, Esq., 585 Pleasant St., Malden, Mass. 02148
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29. Alan R. Rosenberg, Esq., Putnam, Bell & Russell, 53 State
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30. Andrew J. McElaney, Jr., Esq., Denzil McKenzie, Esq.,
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United States District Court
FOR THE
DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE

v.

NEW SEABURY CORP., ET AL

No. CA 76-3190-S



TAKE NOTICE that the above-entitled case has been set for a conference at
2:30 PM, on Friday, Dec. 17, 1976, at Courtroom #6,
15th Floor, P.O. & Courthouse Bldg., Boston, Mass. before
Judge Walter Jay Skinner.

Date Dec . 8, 1976

GEORGE F. MC GRATH

Clerk.

By

Deputy Clerk.

To All counsel of record.

OFFICE
JUL 9 2 40 PM '76
DISTRICT COURT
DISTRICT OF MASS.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOCKETED

* * * * *
MASHPEE TRIBE

v.

NEW SEABURY CORP., et al.
* * * * *

CIVIL ACTION NO.
76-3190-S

OPPOSITION OF DEFENDANT MARY JANE SHOOP TO PLAINTIFF'S
MOTION FOR CLASS CERTIFICATION

Now comes the defendant Mary Jane Shoop, pursuant to the provisions of Local Rule 12(a)(2), and opposes the plaintiff's Motion for Class Certification heretofore filed in this case.

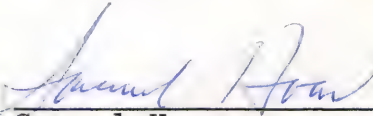
Because the said defendant's counsel have just entered their appearance in this case, leave is requested for permission to submit a separate memorandum of reasons for this opposition, together with such affidavits and other documents as may be appropriate, within thirty (30) days from the date of filing this opposition.

The said defendant further requests an opportunity to

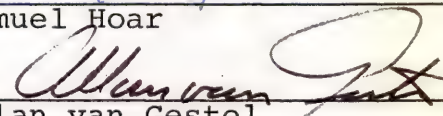
present oral argument in opposition to the motion and suggests that one (1) hour will be required for oral argument by each side.

MARY JANE SHOOP

By her attorneys,



Samuel Hoar



Allan van Gestel

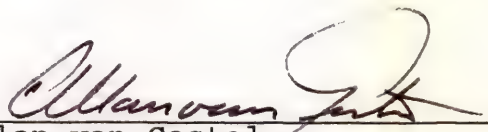
Goodwin, Procter & Hoar
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(617) 523-5700

OF COUNSEL:

Lawrence F. Scofield, Jr.
70 Federal Street
Boston, Massachusetts 02110
(617) 482-2311

CERTIFICATE OF SERVICE

I, Allan van Gestel, attorney for the defendant Mary Jane Shoop, hereby certify that I caused a copy of the within OPPOSITION OF DEFENDANT MARY JANE SHOOP TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION to be served on all counsel and parties pro se whose names appear on the attached list by mailing a copy of same, postage prepaid, to each of them.



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54. John B. Cotton, 78 Two Ponds Rd., Falmouth, Mass.
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United States District Court

FOR THE

DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE

vs.

NEW SEABURY CORP., et al.

No. 76-3190-S

DOCKETED

MR. CLERK:

our

Enter ~~xx~~ appearance as

counsel

for the

defendant, Mary Jane Shoop

in the above-entitled case.

Dated at Boston, Massachusetts

on 3rd day of Dec. , 19 76

~~Address~~

Samuel Hoar

Allan van Gestel

Goodwin, Procter & Hoar
28 State StreetBoston, Massachusetts 02109
(617) 523-5700

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

IN OFFICE
DEC 1 4 44 PM '76
DISTRICT COURT
DISTRICT OF MASS.

* * * * *
MASHPEE TRIBE,
Plaintiff
v.
TOWN OF MASHPEE, ET AL
Defendants
* * * * *

CIVIL ACTION
No. 76-3190-S

DOCKETED

REQUEST FOR LEAVE TO FILE REPLY MEMORANDUM

The defendants, Town of Mashpee on its own behalf and on behalf of all persons or entities not members of the plaintiff Mashpee Tribe and who assert any interest in the subject land, other than those joining herein; New Seabury Corp., Fields Point Manufacturing Corporation and New Seabury Conveyancing Co., Inc.; Russell Makepeace, et al as General Partners in Wiljoels Lands, a Massachusetts Limited Partnership; Leonard W. Peck and Margaret S. Peck; John D. Ferguson; Maurice A. Cooper; and John R. Bunting, et al as Trustees of First Pennsylvania Mortgage Trust, request leave to file a

brief reply memorandum to the plaintiff's memorandum in opposition to defendant's motion to dismiss. Said reply memorandum will be filed on or before December 8, 1976.

NEW SEABURY CORP., NEW
SEABURY CONVEYANCING CO.,
INC., FIELDS POINT MANUFAC-
TURING CORPORATION
By their attorneys,

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Rollins Rollins & Fox

Selma R. Rollins, Esq.
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By their attorneys,

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JOHN R. BUTING, ET AL AS
TRUSTEES OF FIRST PENNSYLVANIA
MORTGAGE TRUST
By their attorneys,

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Thomas V. Urmy, Jr.
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TOWN OF MASHPEE, MAURICE
A. COOPER and JOHN D. FERGUSON,
ET AL
By their attorneys,

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Of Counsel

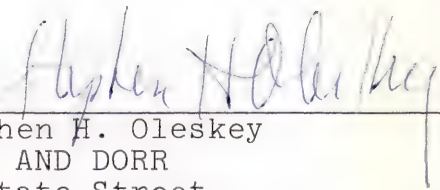
RUSSELL MAKEPEACE, ET AL
General Partners d/b/a Wiljoels
Lands, a Massachusetts Limited
Partnership
By their attorneys,

Thomas Otis

Thomas Otis
One Beacon Street
Boston, Massachusetts 02108

CERTIFICATE OF SERVICE

I, Stephen H. Oleskey, one of the attorneys for the defendant in the above action, hereby certify that I have this day caused a copy of the foregoing Request for Leave to File Reply Memorandum to be served upon the plaintiff herein by causing a copy of same to be mailed, postage prepaid, to: Barry Margolin, Esquire, 364 Boylston Street, 2nd Floor, Boston, Massachusetts, attorney for the plaintiffs.



Stephen H. Oleskey
HALE AND DORR
28 State Street
Boston, Massachusetts 02109
Tel: 742-9100

DATED: December 1, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN CHIEF CLERK
DEC 1 3 59 PM '76

DISTRICT COURT
DISTRICT OF MASS.

MASHPEE TRIBE,

Plaintiff

vs.

NEW SEABURY CORP., et als,

Defendants

CIVIL ACTION NO.
76-3190-S

MOTION OF DEFENDANT,
L & L ASSOCIATES, INC.,
FOR EXTENSION OF TIME
WITHIN WHICH TO FILE
BRIEF IN SUPPORT OF
MOTION TO DISMISS

DOCKETED

Defendant, L & L Associates, Inc., moves for an extension of time to file its Brief in Support of Motion to Dismiss as required by Rule 12 of the rules of this Court for the following reasons:

1. Defendant's attorneys were in the process of preparing the Brief, but due to the press of other business in the office in which it was necessary to prepare and file a lengthy brief in this Court on another case on or before December 2, 1976, defendant's attorneys have been unable to complete same within the time allotted.

2. It is the understanding of present counsel for L & L Associates, Inc., that other counsel have now been retained to appear and represent the defendant, L & L Associates, Inc. and other parties, and that said new counsel will file a Brief in Support of the defendant's Motion to Dismiss.

3. Said other counsel will be entering their appearance in the case to represent L & L Associates, Inc. and other parties, and will need additional time to properly prepare a Brief in Support of defendant's Motion to Dismiss.

4. This application is not made for the purpose of delay.

WHEREFORE, defendant requests that an extension of thirty (30) days from December 1, 1976, be granted for the filing of its brief.

Dated: December 1, 1976

SPENCER & STONE

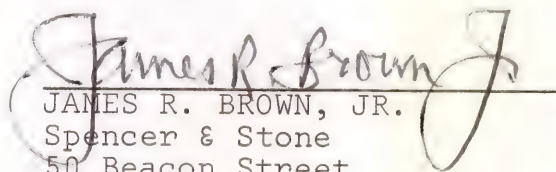
By: 

Attorneys for Defendant,
L & L Associates, Inc.
50 Beacon Street
Boston, MA 02108
Tel. 227-3410

CERTIFICATE OF SERVICE

I, James R. Brown, Jr., Attorney for defendant L & L Associates, Inc., certify that on December 1, 1976 I served the within Motion for Extension of Time Within Which to File Brief on the plaintiff by mailing a copy thereof, postage-prepaid directed to its attorneys and other known attorneys of record listed below.

Signed under the penalties of perjury.


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Tel. 227-3410

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Native American Rights Fund
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Attorney for Plaintiff

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Attorney for Town of Mashpee,
Maurice A. Cooper and John D. Ferguson

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Rollins, Rollins & Fox
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New Seabury Conveyancing Corp., and
Fields Point Manufacturing Corp.

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Attorney for First Pennsylvania
Mortgage Trust

Sumner Babcock, Esq.
Bingham, Dana & Gould
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Attorney for Leonard W. Peck and
Margaret Peck

Thomas Otis, Esq.
Vance, Sanders & Co.
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Boston, MA 02108
Attorney for Thomas Otis, William M.
Atwood, Russell Makepeace, and Maurice Makepeace

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,

PLAINTIFF,

v.

NEW SEABURY CORP., et al.,

DEFENDANTS.

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DISTRICT COURT
DISTRICT OF MASS.

CIVIL ACTION 76-3190-S

DOCKETED

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT
TOWN OF MASHPEE'S MOTION TO DISMISS THE ACTION

I. INTRODUCTION.

Plaintiff Mashpee Tribe filed this defendant class action on August 26, 1976, to establish its right of possession to a large tract of land in Mashpee and Sandwich, Massachusetts. Plaintiff alleged that it is the Indian tribe which has owned this land by right of aboriginal possession since time immemorial; that this right was confirmed by the colonial authorities by 1685; that this land has been protected by the Indian Nonintercourse Act, 25 U.S.C. §177, since the first enactment of that statute in 1790; and that this land was alienated after 1790 under the auspices of the Commonwealth of Massachusetts without federal approval, in violation of the Nonintercourse Act. Plaintiff bases its claim to possession of this land on this federal statutory right.

The Town of Mashpee and other representative defendants have moved to dismiss this action on three grounds. Defendants argue that plaintiff has failed to state a claim for relief because it has failed to affirmatively allege that it is "federally recognized." Defendants also argue that the United States of America and the Commonwealth of Massachusetts are indispensable parties and that, if they cannot be joined, the action should be dismissed. Defendants are asking the court to overturn the law as recently declared by the Court of Appeals for this Circuit with respect to federal recognition, and to overturn repeated decisions of the federal courts with respect to compulsory joinder of the United States. On the issue of joinder of the Commonwealth, the defendants base their argument on an erroneous factual assumption which is unsupported by anything in the record of this action. This memorandum will demonstrate that none of these grounds provides any basis for dismissal of this action.

II. ARGUMENT.

A. The Complaint states a claim upon which relief can be granted.

Defendants argue that plaintiff has failed to state a claim upon which relief can be granted "because it has not pleaded that it is recognized as a tribe either by Congress or its delegate." (Memorandum of Town of Mashpee, et al., in Support of Motion to

Dismiss, hereinafter cited as "D.", at page 4). This contention runs directly contrary to the holding of the United States Court of Appeals for this Circuit in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), aff'g 388 F.Supp. 649 (D.Me. 1975) (hereinafter cited as "Passamaquoddy"). That decision held that the Passamaquoddy Tribe, which concededly had not been "federally recognized," could establish that it was a tribe for purposes of the Nonintercourse Act.

The defendants in Passamaquoddy contended that the Nonintercourse Act applied only to recognized tribes. The Court of Appeals rejected this contention:

But while congress' power to regulate commerce with the Indian tribes, U.S. Const. art. I, §8, includes authority to decide when and to what extent it shall recognize a particular Indian community as a dependent tribe under its guardianship, Congress is not prevented from legislating as to tribes generally, and this appears to be what it has done in successive versions of the Nonintercourse Act. There is nothing in the Act to suggest that "tribe" is to be read to exclude a bona fide tribe not otherwise federally recognized. Nor, as the district court found, is there evidence of congressional intent or legislative history squaring with appellants' interpretation. Rather we find an inclusive reading consonant with the policy and purpose of the Act. The policy has been said to be to protect the Indian tribes' right of occupancy, even when that right is unrecognized by any treaty, and the purpose to prevent the unfair, improvident, or improper disposition of Indian lands. Since Indian lands have, historically, been of great concern to Congress, we have no difficulty in concluding that Congress intended to exercise its power fully. Id., 528 F.2d at 379. (Citations omitted.)

The Court of Appeals thus held that the Passamaquoddy Tribe, while not federally recognized, was subject to the provisions and the protection of the Nonintercourse Act.

While as defendants point out (D. 7-8), the factual elements of the Passamaquoddy litigation were ultimately resolved by a stipulated statement of facts rather than through a trial, the method of proof of the material facts cannot have legal significance. The stipulation for purposes of that case could not have substituted for a policy decision by Congress or its delegate if this were genuinely a political question. As defendants apparently concede,

Neither the courts nor the parties by their stipulation can withdraw from a coordinate branch of the government a question reserved exclusively for its judgment. What the political question doctrine forbids the courts to do directly cannot be accomplished indirectly by stipulation... (D. 8).

In rejecting an identical attempt to distinguish the Passamaquoddy case by the defendants in Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F. Supp. 798 (D.R. I. 1976) (hereinafter cited as "Narragansett") the court observed:

... that stipulation was not intended to and cannot be considered the equivalent of an official federal judgment that the Passamaquoddy Tribe is and should be covered by the Act. If, as defendants contend, such an official decision is a prerequisite to coverage under the Act, then Passamaquoddy was wrongly decided, and the fact of stipulation irrelevant. But this Court is both bound by and in full agreement with the First Circuit's decision in that case.

Passamaquoddy establishes that a tribe can have rights under the Nonintercourse Act regardless of whether it is "federally recognized," and defendants cannot prevail on this motion unless they establish that Passamaquoddy was wrongly decided.

Defendants' argument rests on their premise that plaintiff must show that it is a tribe in two different senses: That it is not only a tribe for purposes of the Nonintercourse Act, but that it is also "a sovereign tribe in the legal and political sense." (D. 3). This distinction is sheer meaningless invention, without support in any authority or reasoning advanced by defendants. In this action plaintiff only claims federally protected rights as an Indian tribe under the Nonintercourse Act. No other definition of "tribe" is relevant to plaintiff's right to recover under that Act. The definition of "tribe" under the Act, as Passamaquoddy establishes, does not turn on any form of "recognition."

In order to undermine the authority of Passamaquoddy and sustain their inventive notion of the dual meaning of "tribe" defendants first seek to identify the issue in this action with the doctrine of recognition of foreign nations as "firmly entrenched in international law" (D. 3-4) and under "standard international law." (D. 9). One of the first principles established in federal Indian law, however, is that Indian

tribes do not share the same status as foreign nations. They are something entirely different, "domestic dependent nations" whose relationship to the United States is "perhaps unlike that of any other two people in existence." Cherokee Nation v. Georgia, 30 U.S. (5Pet.) 1, 16-17 (1831). Tribal rights are determined, not by reference to international law or abstract principles of sovereignty, but principally by reference to the applicable laws and treaties adopted by Congress. McClanahan v. State Tax Commission, 411 U.S. 164, 172 (1973). Defendants must base their theory of recognition on the body of federal Indian law, not on their strained analogy to international relations.¹

Defendants next fall back (D. 5-6) to the same line of political question cases analyzed and distinguished by the District Court in Passamaquoddy, 388 F. Supp. at 658-659, 664. The court concluded that the political question cases in the Indian law field

deal solely with the power of Congress to legislate with respect to Indians. They fall into two categories: (1) cases in which the constitutional power of Congress to enact legislation respecting a particular group of Indians is challenged on the ground that the group is

1. Plaintiff notes that defendants' principle reference to international law theory, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409-412 (1964) (D. 3), itself casts considerable doubt on their theory of recognition of foreign nations even if the analogy to Indian law were more relevant. See esp., id. at 411, n. 12.

not an "Indian tribe" within the meaning of the Commerce Clause; and (2) cases which hold that Congressional action involving the administration of Indian affairs is not subject to judicial challenge on the ground that it violates previous treaty commitments. Id. (Citations omitted).

Defendants rely on two cases in the first category of Constitutional challenges to Congressional power: United States v. Sandoval, 231 U.S. 28 (1913) and United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866). (D. 5). Only the Constitutional Challenge presented a political question in these cases, not any issue involving implementation of statutes affecting Indians. For example, in United States v. Holliday, supra, the defendant was charged with violation of a federal statute prohibiting the sale of liquor to Indians under the charge of federal Indian agents. The Court first interpreted the statute to determine whether "the Indian named could be considered as under the charge of an Indian agent within the meaning of the Act." Id., 70 U.S. at 418. Only after construing the statute as applicable to the facts of the case did the Court consider the defendants' contention that the alleged victim was a citizen of Michigan and no longer a tribal Indian within the regulatory power of Congress. It was only that Challenge to Congressional power which raised a non-justiciable issue. Similarly, in United States v. Sandoval, supra, the Court first determined that Congress clearly intended that certain liquor trade restrictions should apply to the Pueblos before it turned to whether "Congress competently can prohibit the introduction of intoxicating liquor." Id., 231 U.S. at 38.

Again, only that Constitutional question posed a non-justiciable issue.

Defendants also cite, without discussion, two decisions reflecting the second line of Indian political question cases: Those which refuse to overturn Congressional actions because of alleged conflict with earlier treaty provisions. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (D. 6); Sioux Indians v. United States, 277 U.S. 424, 434-437 (1928) (D. 7). These decisions do not even have a facial relationship to defendants' theory of recognition.

Defendants' reliance on Haile v. Saunooke, 246 F.2d 293 (4th Cir. 1957) (D. 7) is equally misplaced. This decision concerned the Eastern Cherokees, whose tribal status had been lawfully terminated by Congress in the Treaty of New Echota, which required all Cherokees to remove from North Carolina. See, id. at 294-296. Thereafter the Cherokees who remained in North Carolina could only reacquire rights under federal law by subsequent Congressional action expressly restoring their tribal rights.

Defendants' reliance on United States v. Washington, 520 F.2d 676, 692-693 (9th Cir. 1975) (D. 6, 13) is remarkable, since that decision expressly held that two tribes who are "not recognized as organized tribes by the federal government"

nonetheless could judicially establish their fishing rights under a federal treaty. The Court of Appeals held:

Whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure is a factual question which a district court is competent to determine. Id.

This court is equally competent to determine the facts regarding plaintiff's status as a tribe under the Nonintercourse Act.

Finally, defendants make several references to Baker v. Carr, 369 U.S. 186, 215 (1962) (D. 6, 10). That opinion noted the existence of a political question doctrine with respect to the status of Indian tribes, but did not define the circumstances to which it applied. The Court cautioned that its survey of political question cases did not define "their implications in other contexts" than that before the court nor "obscure the need for case-by-case inquiry." Id. at 210-211. The only bearing of that opinion is in its outline of the criteria for defining what are political questions. These criteria were carefully applied to circumstances similar to this case in Narragansett, supra. The court concluded that the policy judgments committed to Congress had already been made, since the court was only asked to implement a statute which Congress had made generally applicable to all tribes. The Court also found that there were discoverable and manageable

standards provided for implementation of the statute, since it was settled that for purposes of the Nonintercourse Act a tribe was simply,

a body of Indians of the same or a similar race, united in a community under one leadership or government and inhabiting a particular, though sometimes ill defined, territory. Id.

Accord, United States v. Candelaria, 271 U.S. 432, 442 (1926); Montoya v. United States, 180 U.S. 261, 266 (1901); Passamaquoddy, supra, 528 F.2d at 377, n. 8. Defendants' contention that there are no "judicially discoverable and manageable standards" (D. 10), is unsupported by any showing that these standards are not susceptible to ordinary fact finding.

This action presents no non-justiciable issues. The political question doctrine in the field of Indian law operates to shield Congressional judgments about Indian policy from challenges to the authority of Congress. It has no role here where the action only seeks to interpret and apply the laws enacted by Congress, a task which has always belonged to the courts. Passamaquoddy, supra. Defendants have provided no authority for their attempted distinction between the applicability of the Nonintercourse Act to all tribes and the supposed limits on the kinds of tribes who can bring suit for violations of that Act.

If plaintiff is a tribe for purposes of the Nonintercourse Act, then it may assert its rights under that statute in this action, regardless of what status it occupies under other federal laws or policies.

Finally, even if this court were to determine that federal recognition is a prerequisite to this action, the Complaint cannot be dismissed. If "tribe" must mean "recognized tribe" for purposes of this action, plaintiff is entitled to show in support of its present allegation of tribal status that it is a federally recognized tribe.² A complaint cannot be dismissed for failure to state a claim unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Ballou v. General Electric Co., 393 F.2d 398, 399 (1st Cir. 1968).

2. Defendants' contention that plaintiff is "unrecognized" as a matter of law (D. 12) reflects their misunderstanding of the "recognition" concept. Each statute which applies by its terms only to "recognized" tribes has its own standards; defendants cite one vague definition, used for 25 U.S.C. §479 (D. 12). Other statutes, such as 25 U.S.C. §1452(c), apply to tribes "recognized as eligible for services from the Bureau of Indian Affairs." As now interpreted by the Department of the Interior, this includes tribes eligible under any provision of law for any services; if plaintiff prevails in this claim, its restricted land entitles it to realty management services from the Bureau of Indian Affairs. E.G., 25 C.F.R. §§131.1(c), 141.1(b), 151.1(h). Plaintiff would thereby be "recognized" under some provisions even if not for others. There is no single uniform criterion or list of recognized tribes. Each statute in Title 25 is applied according to its own terms, and the Nonintercourse Act has no requirements for "recognition."

Plaintiff's Complaint states a claim under the Nonintercourse Act as authoritatively interpreted in this Circuit and may not be dismissed.

B. The United States is not an indispensable party.

Defendants argue (D. 14-26) that the action should be dismissed unless the United States is joined as an indispensable party. Plaintiff agrees that the United States could be joined if feasible under Rule 19(a). The United States cannot be sued, however, in its role as guardian of the Indian tribes, in the absence of some Congressional provision authorizing a waiver of its sovereign immunity. E.g., United States v. Hellard, 322 U.S. 363, 366-368 (1944); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-513 (1950); Minnesota v. United States, 305 U.S. 382, 388-389 (1939); Skokomish Indian Tribe v. France, 269 F.2d 555, 559-560 (9th Cir. 1959). The district courts lack subject matter jurisdiction of any action against the United States unless there is such a statutory waiver. Cyrus v. United States, 226 F.2d 416, 417 (1st Cir. 1955). As defendants concede, the United States may not be joined under Rule 19(a) where the Court would lack jurisdiction over the subject matter because

of the sovereign immunity of the United States. (D. 16-17).
See, American Guaranty Corp. v. Burton, 380 F.2d 789, 791
(1st Cir. 1967); Narragansett, supra.; Carr v. District of
Columbia, 371 F. Supp. 293, 296 (D.D.C. 1974).

The question in this action, therefore, is whether
there is any applicable statute waiving the government's
sovereign immunity; and if not, whether the action can proceed
in the absence of the United States.

Defendants' only claim that Congress has enacted such
a waiver of sovereign immunity is based on 28 U.S.C. §2409(a).
(D. 17-18). On its face, this statute is inapplicable, since
it expressly provides:

This section does not apply to trust or restricted
Indian lands. 28 U.S.C. §2409(a)

Defendants' contention (D. 18) that this exception only applies
to lands in which the fee is held by the United States in trust
for Indians is frivolous. The exception applies by its terms
both to trust lands, where the government holds the fee, and
restricted lands, where the government does not hold the fee
but the land is subject to statutory restrictions on alienation.
This distinction is explained in United States v. Bowling, 256 U.S.
484, 487 (1921). Cf., United States v. Candelaria, 271 U.S.
432, 442 (1926).

Defendants further argue that the exception for Indian lands under §2409(a) is inapplicable if defendants can show, on the merits, that the land is not Indian land. (D. 18-19). In Carlson v. Tulalip Tribes of Washington, 510 F.2d 1337, 1339 (9th Cir. 1975), however, the court dismissed the land claim against the Tulalips because the United States was indispensable and could not be joined. Although the adverse party in the boundary dispute contended that the subject land was not part of the Indian reservation, the court found that the exception for Indian lands in §2409(a) applied, and that the government had not waived its immunity. There, as here, if the adverse party had succeeded on the merits, he would have established that the disputed lands were not "trust or restricted Indian lands"; but sovereign immunity protects the sovereign from litigating any issue without its consent, not only those issues on which it would prevail anyway on the merits. See, Larson v. Domestic and Foreign Finance Corp., 337 U.S. 682, 693 (1949). While as defendants note, Carlson involved trust lands in which the United States held the fee (D. 18), there was no suggestion that the result would be different for restricted lands.

Defendants cite United States v. Phillips, 362 F. Supp. 462 (D. Neb. 1973), where the court refused to dismiss a

counterclaim against the Government in the Government's suit to quiet title to Indian land. (D. 18). In such cases, the government has voluntarily chosen to litigate its claim of title and will necessarily be bound by an adverse decision on its claim. The decision's rationale applies only where the merits of the government's claim are initially determined with the consent of the United States in its own suit.

Defendants ask that this holding be extended; they ask that a decision on the government's interest in restricted lands bind the United States, simply because the adverse party claims that the land is not in fact restricted, even though the government has never consented to litigate those issues. This broad reading would effectively repeal the continued protection for Indian lands contained in the exception to §2409(a): the adverse party in such actions is always claiming, on the merits, that the land belongs to them rather than to the Indians. This reading violates the principles requiring the court to strictly construe any statutory waiver of immunity, Nickerson v. United States, 513 F.2d 31, 33 (1st Cir. 1975), and to construe any ambiguities in statutes affecting Indians to favor protection of the Indians. Passamaquoddy, supra., 528 F.2d at 380.

Furthermore, the broad interpretation proposed by defendants would drastically alter the prior law which barred such suits against the United States. The legislative history

of §2409(a) shows that the Indian exception was inserted precisely to avoid any such unilateral change in the Government's trust relationship with the Indians. The Interior Department's report to the Senate urged adoption of the Indian lands exception. The recommendation was founded on the government's policy to avoid

abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians. 1972 U.S. Code Congressional and Administrative News 4547, 4556-4557.

The United States has not consented to be sued with respect to its interest in restricted Indian lands. No federal interest other than that in the restriction of Indian lands is alleged in defendants' motion to join the United States. The United States cannot be joined and the issue is therefore whether the action can proceed in its absence.

Defendants concede (D. 20) that the courts have consistently ruled that the United States is not an indispensable party to any action by Indians to enforce their federally protected land rights. E.g., Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369-372 (1968); Capitan Grande Band of Mission Indians v. Helix Irrigation District, 514 F.2d 465, 470 (9th Cir. 1975), cert. denied, 96 S. Ct. 143 (1975); Fort Mojave

Tribe v. La Follette, 478 F.2d 1016, 1017-1018 (9th Cir. 1973); Skokomish Indian Tribe v. France, 269 F.2d 555, 560 (9th Cir. 1959); Choctaw and Chickasaw Nations v. Seitz, 193 F.2d 456, 458-461 (10th Cir. 1951), cert. denied, 343 U.S. 919 (1952); Narragansett, supra. See, Creek Nation v. United States, 318 U.S. 629, 640 (1943). These decisions found that the Congressional objective of providing effective protection for restricted Indian land could not be achieved unless the Indians were free to press their claims independently of the United States. As pointed out in the extensive discussion in Choctaw and Chickasaw Nations v. Seitz, supra, 193 F.2d at 460-461, the denial of the tribes' separate right would not remove any cloud on defendants' title, for the United States could never lose the option of prosecuting the same claims. At least the merits of the adverse claims can be determined by an immediate hearing of the tribe's suit. The court found that the law

clearly recognized the rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands, although the United States would not be bound by the judgment in such an action, to which it was not a party, brought by the restricted Indian or an Indian tribe or pueblo. Id., 193 F.2d at 459.

This holding was approved by the Supreme Court in Poafpybitty v. Skelly Oil Co., supra, 390 U.S. at 371, which adopted the

same rule with respect to individual Indian owners of restricted allotments of tribal land. This action should proceed regardless of whether the United States is made a party to the action.

Defendants ask this court to overturn this principle of law on several grounds. First, they argue that the federal government's fiduciary obligations to protect Indian land cannot be impaired by a judgment entered in the government's absence, since it would not bind the United States. (D. 21-23). This only suggests that the government is never indispensable in Indian land claims. It would not buttress defendants' motion to dismiss this action because of the government's absence.

Defendants' next contention is that the plaintiff has an adequate alternative remedy if the action is dismissed. They cite Passamaquoddy, incorrectly, for the proposition that Indian tribes may "institute suit against the United States to compel action on their behalf." (D.24). Passamaquoddy only reaffirms the courts' power to correct legal errors made by the government in considering such claims. It does not reach the issue of whether a tribe may overcome the traditional obstacle of prosecutorial discretion. As the district court noted,

plaintiffs do not ask this court to order the Attorney General to bring suit on their behalf. Id., 388 F. Supp. at 66 5.

While there is thus some scope of review of the government's decision on a request for assistance, such a request can still be futile; it still does not relieve the cloud on defendants' titles; it still does not enforce plaintiff's present possessory rights. It may only, as Passamaquoddy illustrates, defer final resolution of the issues for another five years. The Passamaquoddy Tribe first presented its claims to the Department of the Interior on February 22, 1972; the government is now scheduled to announce its intentions regarding the claim on January 15, 1977.

Defendants erroneously cite Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973) (D. 24-25), for the proposition that plaintiff could seek damages from the United States for its failure to enforce plaintiff's rights. In the first place, that remedy would be entirely inadequate, since plaintiff seeks to recover possession of the land, not damages, and the statutory policy is principally aimed at protecting that occupancy right. See, e.g., Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-670 (1974); United States v. Santa Fe Pacific R.R., 314 U.S. 339, 345 (1941); United States v. Candelaria, 271 U.S. 432, 441 (1926); Passamaquoddy, supra, 528 F.2d at 377, 388 F.Supp.

at 657. Furthermore, defendants grossly misunderstand the Edwardsen decision. The Edwardsen court did not hold or even hint that plaintiffs had a right to damages from the United States for any breach of fiduciary obligations. The plaintiffs sought enforcement of their damage claims against private third parties for pre-Settlement Act trespasses on their land. The result of the opinion was a voluntary choice by the United States to institute litigation against such third parties who had trespassed on the Alaska native lands involved in the suit. Finally, it must be noted that whatever remedy was proper in Edwardsen, where Congress had extinguished Indian title when it settled the Alaska Native claims, that remedy has no bearing here where Congress has never extinguished Indian title. No matter what damages plaintiff might recover, plaintiff's right to recover possession of the land, and the resulting cloud on defendants' title, could not be extinguished absent legislative action.

In short, defendants have not demonstrated any change in the law which provides plaintiff an alternative means of enforcing its possessory claims. As a practical matter, there is no real likelihood that the United States would relitigate these issues following a decision for defendants on the merits. See, Narragansett, supra. The prompt resolution of this action,

even in the absence of the United States, is the best available means of either enforcing plaintiff's possessory rights or lifting the cloud on defendants' titles. This action should proceed in the absence of the United States.

C. The Commonwealth of Massachusetts is not an indispensable party.

Defendants argue that the Commonwealth of Massachusetts should be joined because it has a claim to a property interest in the subject land. (D. 26-27). They are incorrect because the Commonwealth in fact neither claims nor possesses such an interest and its interest would, in any event, be unrelated to the relief sought here. Defendants rely on the principles of Indian title. In the original thirteen states, the natives owned a right of occupancy good as against the world until extinguished by the sovereign. The United States, as sovereign successor to Great Britain, held the exclusive right to extinguish that Indian title. The states held the pre-emptive right to purchase the Indian lands once the United States extinguished the Indian title. See, Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

That pre-emptive right of purchase, sometimes called the "ultimate fee," once belonged to Massachusetts or its predecessor, the Colony of New Plymouth, by grant from the Crown. It does not follow, however, that establishment of plaintiff's claim to a present right of occupancy establishes any current interest in the Commonwealth. The two issues are separate. The pre-emptive right is a transferrable interest which can be transferred to a private party, although such private parties cannot take possession until Indian title is extinguished by the United States. For example, Massachusetts itself acquired and later sold the pre-emptive rights to Indian lands in New York to private individuals. See, Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 368 (1856). If the Commonwealth did not transfer the fee when it recognized plaintiff's proprietary rights, then it did so when it purported to vest fee title in various third parties during the nineteenth century. A transferor of property normally conveys every interest he possesses, even though that is less than what he purports to convey. R. G. PATTON and C. G. PATTON, LAND TITLES §212 (1957); 25 C.J.S., DEEDS, §122; 23 Am. Jur. 2d, DEEDS, §289. See, Litchfield v. Ferguson, 141 Mass. 97, 99 (1886). The same rule applies to public land grants. Borax, Ltd v. Los Angeles, 296 U.S. 10,22 (1936).

Even if Massachusetts could not convey a full fee simple title, there is no evidence that it did not divest itself of its pre-emptive rights or "ultimate fee." The Commonwealth retained no interest and claims none now. If the pre-emptive rights still exist, they belong to someone other than the Commonwealth.

Establishment of plaintiff's Indian title is therefore independent of the question of whether the pre-emptive right is located in plaintiff, defendants, the Commonwealth, or some third party. Defendants' motion fails with respect to the joinder of the Commonwealth because the "factual basis" which they assert as a matter of law (D. 26) in reality involves a complex factual issue separate from that raised by plaintiff's claim of possessory rights.

This action should thus proceed in the absence of the Commonwealth.

In determining what parties must be before the court, two matters deserve consideration: What type of legal interest in the property is asserted, and what type of relief is demanded. Where the interest is distinct and the relief sought does not go beyond the protection of that interest, only the parties immediately involved are indispensable and the fact that other parties may have like interests is immaterial. 3A J. MOORE, FEDERAL PRACTICE ¶ 19.09 p. 2311 (1974).

Accord, 7 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §1621, p. 207 (1972). As has been demonstrated, the legal interest asserted by plaintiff, the Indian title or right of

occupancy, is distinct from the ultimate fee or pre-emptive right allegedly claimed by the Commonwealth. Different facts and principles of law would determine the existence of those two separate interests. And complete relief could be granted to plaintiff or defendants, securing their respective rights of possession, without reaching the question of pre-emptive rights. The Commonwealth therefore need not be joined to afford complete relief under Rule 19(a) (1). There is no evidence that the Commonwealth "claims an interest" in the subject land, and it therefore need not be joined under Rule 19 (a) (2). At most, the issues involve certain common questions of fact or law which might allow for permissive joinder under Rule 20 (a) or permissive intervention under Rule 24 (b) (2). There is no basis for compulsory joinder.

Should the court determine that the Commonwealth ought to be joined under Rule 19 (a), it appears that such joinder is barred by the Eleventh Amendment. Defendants rely on M.G.L.A. c. 237, §2, as an applicable waiver of immunity (D. 28), but their quotation of the statute unfortunately omits the crucial last three words:

A civil action to recover freehold estates in fee simple, fee tail or for life may be prosecuted against the Commonwealth under this Chapter. (Emphasis supplied).

The Commonwealth has limited its consent to actions brought under this Chapter of its General Laws. This may limit the consent to actions brought in state court under the procedures set out therein. In any event, the waiver appears facially inapplicable to plaintiff's claim to a right of occupancy, which is presumably not a freehold estate.

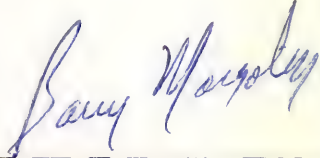
If the court must determine whether to dismiss the action under Rule 19(b) for nonjoinder of the Commonwealth, the same calculation applies as for nonjoinder of the United States, except that the Commonwealth's interests would be even more clearly separable. A judgment in its absence could not prejudice the Commonwealth or any other party with respect to the possessory relief sought here. The judgment would not touch on the ownership of the supposed pre-emptive rights, which defendants would like to litigate with the Commonwealth. The judgment would fully resolve the right of possession which is disputed here. As noted earlier, dismissal would leave plaintiff with no alternative remedy but would not lift the cloud on defendants' title. As the courts have consistently held, this action can proceed despite the capacity of the United States to relitigate the possessory rights which are directly in dispute here. A fortiori, the action can proceed

without the Commonwealth, even though the Commonwealth could theoretically litigate the issue of pre-emptive rights which is at most indirectly raised by this suit. The action should proceed to the merits.

III. CONCLUSION.

It is respectfully submitted that defendants' motion to dismiss should be denied.

Dated: November 17, 1976
Boston, Massachusetts



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ATTORNEYS FOR PLAINTIFF

IN CLERK'S OFFICE

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DISTRICT COURT
DISTRICT OF MASS.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DOCKETED

MASHPEE TRIBE,

PLAINTIFF,

v.

NEW SEABURY CORP., et al.,

DEFENDANTS.

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CIVIL ACTION 76-3190-S

PLAINTIFF'S NOTICE OF OPPOSITION TO DEFENDANT
TOWN OF MASHPEE'S MOTION TO DISMISS THE ACTION

Plaintiff hereby provides notice of its opposition to the
motion of defendant Town of Mashpee, et al., to dismiss the action.

Dated: November 17, 1976
Boston, Massachusetts

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I, Barry A. Margolin, attorney for plaintiff, certify that on the 18th day of November 1976, I caused copies of the within Notice and supporting memorandum, to be deposited, postage prepaid, in the United States Mail, addressed to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN THE DISTRICT COURT
DISTRICT OF MASS.

MASHPEE TRIBE,

PLAINTIFF,

v.

NEW SEABURY CORP., et al.,

DEFENDANTS.

CIVIL ACTION 76-3190-S

DOCKETED

PLAINTIFF'S MOTION FOR FURTHER EXTENSION OF TIME FOR FILING OF
MOTION TO STRIKE DEFENSES

Plaintiff Mashpee Tribe moves the court to extend the time allowed for filing of a motion to strike defenses under Rule 12 (f) of the Federal Rules of Civil Procedures to and until January 1, 1977, on the grounds,

(1) That the thirteen proposed representative defendants, designated in plaintiff's motion for class certification, have moved to dismiss the action but have not filed answers, and only 29 of the 146 named defendants have thus far filed their answers;

(2) That a motion to strike defenses may be the best means of narrowing the issues for trial of this action, but to avoid duplication such a motion should be deferred until the representative defendants are designated and have filed their answers;

(3) That the extension requested will allow time for the court to clarify the procedures which will govern this action, and to fix an orderly schedule for filing of answers and motions to strike defenses with respect to all parties.

Dated: November 17, 1976
Boston, Massachusetts

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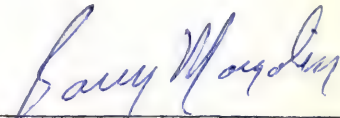
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I, Barry A. Margolin, attorney for plaintiff, certify that on the 18th day of November 1976, I caused copies of the within Motion to be deposited, postage prepaid, in the United States Mail, addressed to:

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Assistant Attorneys General, 1 Ashburton Place, Boston, Mass.,
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Barry A. Margolin
Native American Rights Fund
364 Boylston St., 2nd Floor
Boston, Mass. 02116
(617) 266-7505

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN CLERK'S OFFICE

NOV 19 2 43 PM '76

DISTRICT COURT
DISTRICT OF MASS.

MASHPEE TRIBE,

Plaintiff

vs.

NEW SEABURY CORP., et als,

Defendants

CIVIL ACTION
NO. 76-3190-S

DOCKETED

MOTION OF DEFENDANT, L & L ASSOCIATES, INC.,
TO AMEND ANSWER

Defendant, L & L Associates, Inc., moves that
its Answer be amended as follows:

By striking out Paragraph 59 in
defendant's Answer and substituting therefor the
following new Paragraph 59:

59. Defendant admits it claims title
under deed of Otis S. Nickerson and Willard H.
Nickerson to said defendant under its former name of
L & O Associates, Inc. dated December 27, 1971, recorded
in the Barnstable Registry of Deeds, Book 1578, Page 52,
then subject to its mortgage to Hyannis Cooperative
Bank dated December 27, 1971, recorded in said Registry,
Book 1578, Page 55, said mortgage having been

subsequently discharged; that this defendant subsequently subdivided its area as shown on two plans by Barnstable Survey Consultants, Inc., one dated January 1972, and recorded in said Registry in Plan Book 252, Page 62, and the other dated August 1972, and recorded in said Registry in Plan Book 262, Page 57, and after sales of various lots retains title to the streets and ways shown on said plans in this defendant's development; that the lots stated in Paragraph 59 of plaintiff's complaint which are referred to by reference to the Assessor's Map and Lot number fairly describe the original parcels owned by this defendant; that Lot 37 as shown on the recorded plan is subject to a mortgage by L & L Associates, Inc. in the original amount of twenty-five thousand (\$25,000.00) dollars to Puritan Mortgage Company, Inc. dated May 30, 1974, recorded in the Barnstable Registry of Deeds, Book 2047, Page 24, being subsequently assigned to and presently held by Holyoke Savings Bank of Holyoke, Massachusetts, by assignment recorded in said Registry, Book 2064, Page 186; and the remainder of the defendant's development consisting of 96 lots and private ways is subject to its mortgage to the Merchants Bank and Trust Company of Cape Cod, a Massachusetts corporation

doing business in Hyannis, dated April 24, 1975,
recorded in said Registry, Book 2175, Page 19, in the
original amount of two hundred thousand (\$200,000.00)
dollars.

SPENCER & STONE

By: Henry W. Keyes
50 Beacon Street
Boston, Massachusetts
Telephone: 227-3410

CERTIFICATE OF SERVICE

I, James R. Brown, Jr., attorney for
defendant, L & L Associates, Inc., certify that on
November 18, 1976, I served the within Motion of
Defendant, L & L Associates, Inc., to Amend Answer, on
the plaintiff by mailing a copy thereof, postage-prepaid
directed to its attorneys, Barry A. Margolin, Esq., at
his office, 364 Boylston Street, Boston, Massachusetts,
and Thomas N. Tureen, Esq., at his office, 173 Main
Street, P.O. Box 392, Calais, Maine.

Signed under the pains and penalties of
perjury.

James R. Brown Jr.
JAMES R. BROWN, JR.

FICE

NOV 18 2 43 PM '76

DISTRICT COURT
DISTRICT OF MASS.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,)	
)	
Plaintiff	)	CIVIL ACTION
	)	NO. 76-3190-S
vs.)	
)	
NEW SEABURY CORP., et als,)	
)	
Defendants)	
)	

DOCKETED

MOTION OF DEFENDANT, L & L ASSOCIATES, INC.,
TO AMEND ITS MOTION TO DISMISS

Defendant, L & L Associates, Inc., moves to
amend its Motion to Dismiss as follows:

By striking out Paragraph 1(e) as
appearing therein and substituting the following new
Paragraph 1(e):

(e) Lands of this defendant are subject
to its mortgage on Lot 37 as shown on recorded plan in
the original amount of twenty-five thousand (\$25,000.00)
dollars to Puritan Mortgage Company, Inc. dated May 30,
1974, recorded in the Barnstable Registry of Deeds,
Book 2047, Page 24, assigned to and presently held by
the Holyoke Savings Bank of Holyoke, Massachusetts, by
assignment recorded in said Registry, Book 2064, Page

186; the remainder of the defendant's development consisting of 96 lots and private ways is subject to its mortgage to Merchants Bank and Trust Company of Cape Cod, dated April 24, 1975, recorded in said Registry, Book 2175, Page 19, in the original amount of two hundred thousand (\$200,000.00) dollars; and the said assignee Holyoke Savings Bank and mortgagee Merchants Bank and Trust Company are necessary and essential parties needed for the just adjudication of this action.

SPENCER & STONE

By: Henry W. Keyes
50 Beacon Street
Boston, Massachusetts
Telephone: 227-3410

CERTIFICATE OF SERVICE

I, James R. Brown, Jr., attorney for defendant, L & L Associates, Inc., certify that on November 18, 1976, I served the within Motion of Defendant, L & L Associates, Inc., to Amend its Motion to Dismiss, on the plaintiff by mailing a copy thereof, postage-prepaid, directed to its attorneys, Barry A. Margolin, Esq., at his office, 364 Boylston Street, Boston, Massachusetts, and Thomas N. Tureen, Esq., at his office, 173 Main Street, P.O. Box 392, Calais, Maine.

Signed under the pains and penalties of perjury.

James R. Brown Jr.
JAMES R. BROWN, JR.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,

Plaintiff

vs.

NEW SEABURY CORP., et als,

Defendants

CIVIL ACTION NO.
76-3190-S

MOTION OF DEFENDANT,
L & L ASSOCIATES, INC.,
FOR EXTENSION OF TIME
WITHIN WHICH TO FILE
BRIEF IN SUPPORT OF
MOTION TO DISMISS

Defendant, L & L Associates, Inc., moves that the time within which it shall file its Brief in Support of Motion to Dismiss be extended to and including December 1, 1976, or such other date as may be designated by this Honorable Court, and for reasons therefor says:

1. Defendant's counsel require additional time to prepare said Brief in Support of its Motion to Dismiss; and

2. The date for a hearing on the pending Motions to Dismiss has not as yet been assigned and there will be no delay in said hearing.

Dated: November 15, 1975

SPENCER & STONE

*Nov. 29, 1976 Skinner, J.
"Motion Allowed."
By the Court,
Chaffin
Deputy Clerk*

BY:

Henry Keyes
Attorneys for Defendant
L & L Associates, Inc.
50 Beacon Street
Boston, MA 02108
Tel. 227-3410

CERTIFICATE OF SERVICE

I, James R. Brown, Jr., Attorney for Defendant, L & L Associates, Inc., certify that on November 15, 1976, I served the within Motion of Defendant, L & L Associates, Inc., to Extend Time Within Which to File Brief in Support of Motion to Dismiss on plaintiff by mailing a copy thereof, postage-prepaid, directed to its attorneys, Barry A. Margolin, Esq., at his office, 364 Boylston Street, Boston, Massachusetts, and Thomas N. Tureen, Esq., at his office, 173 Main Street, P.O. Box 392, Calais, Maine.

Signed under the pains and penalties of perjury.


JAMES R. BROWN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RECEIVED
NOV 15 1 11 PM '76
DISTRICT COURT
DISTRICT OF MASS.

MASHPEE TRIBE,

PLAINTIFF,

v.

NEW SEABURY CORP., et al.,

DEFENDANTS.

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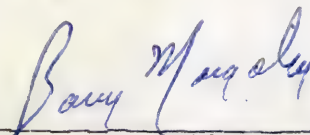
CIVIL ACTION 76-3190-S

DOCKETED

PLAINTIFF'S MOTION FOR EXPEDITED HEARING
ON MOTION FOR CLASS CERTIFICATION

Plaintiff Mashpee Tribe moves the court to set a date for hearing at the earliest opportunity on Plaintiff's Motion for Class Certification, on the grounds that most other aspects of this action with respect to most named defendants will remain in abeyance until the decision of said motion, and it is in the interests of plaintiff and most defendants to minimize avoidable delays in the litigation of this action.

Dated: November 13, 1976
Boston, Massachusetts



Barry A. Margolin
Native American Rights Fund
364 Boylston St., 2nd floor
Boston, Massachusetts 02116
(617) 266-7505

Thomas N. Tureen
Dennis M. Montgomery
Native American Rights Fund
173 Main Street, P.O. Box 392
Calais, Maine 04619
(207) 454-2113

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I, Barry A. Margolin, attorney for plaintiff, certify that on the 15th day of NOVEMBER, 1976, I caused copies of the within MOTION to be deposited, postage prepaid, in the United States Mail, addressed to:

1. Edwin J. Carr, Esq., May, Bilodeau, Dondis & Landergan, 294 Washington St., Boston, Mass. 02108
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

31 PM '76

U.S. DISTRICT COURT
DISTRICT OF MASS.

MASHPEE TRIBE,

PLAINTIFF,

v.

NEW SEABURY CORP., et al.,

DEFENDANTS.

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CIVIL ACTION 76-3190-S

DOCKETED

PLAINTIFF'S NOTICE OF OPPOSITION
TO DEFENDANT GREENWOOD DEVELOPMENT CORP.'S
MOTION FOR SUMMARY JUDGMENT

Plaintiff Mashpee Tribe hereby provides notice of its
opposition to defendant Greenwood Development Corp.'s motion for
summary judgment.

Dated: Boston, Massachusetts
November 11, 1976

Barry Margolin

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Native American Rights Fund
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Calais, Maine 04619
(207) 454-2113

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I, Barry A. Margolin, attorney for plaintiff, certify that on the 15th day of November, 1976, I caused copies of the within Notice and supporting memorandum to be deposited, postage prepaid, in the United States Mail, addressed to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RECEIVED
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DISTRICT OF MASS.

MASHPEE TRIBE,

PLAINTIFF,

v.

NEW SEABURY CORP., et al.,

DEFENDANTS.

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CIVIL ACTION 76-3190-S

DOCKETED

PLAINTIFF'S REPLY MEMORANDUM TO STATE
DEFENDANT'S OPPOSITION TO MOTION FOR
CLASS CERTIFICATION

Defendant Colton H. Bridges has opposed Plaintiff's Motion for Class Certification solely with respect to the provisions which would stay the action with respect to said defendant, except as to the issue of sovereign immunity. Defendant Bridges asks in substance that he be separately represented because of his potential conflict with all other defendants. Plaintiff believes that if the court determines that defendant Bridges' interests are antagonistic to all other class members with respect to the issues to be litigated between plaintiff and the defendant class, then defendant Bridges must be excluded from the defendant class; the action should then proceed against defendant Bridges as an individual defendant and against the remainder of the defendant class as a class. Defendant Bridges could not, however, be made a representative defendant if such a conflict existed.

As set forth in the Memorandum in Support of Plaintiff's Motion for Class Certification, at pp. 5-7, the court must determine whether the class members share a common and non-antagonistic interest in defeating plaintiff's claim to the subject land; no conflict as to other issues is relevant to that determination. If the court determines that the proposed representatives would ade-

quately represent other members of the class, no other member has a right to separate representation as an active participant, and under the circumstances of this action it is appropriate for the court to exercise its power to exclude other active parties to avoid undue and costly delays in the resolution of the action.

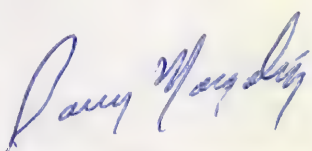
Defendant Bridges' opposition to certification rests on his contention that the real party in this action is the Commonwealth of Massachusetts, and that the Commonwealth may be in conflict with other defendants with respect to its third party liability. But plaintiff has not named the Commonwealth, and unless defendant Bridges prevails with respect to his potential sovereign immunity defense by establishing that the Commonwealth is in fact the real party here, defendant Bridges is sued solely as an individual occupying the plaintiff's land without authority. The Commonwealth could not be bound by the results of this action. See, Tindal v. Wesley, 167 U.S. 204 (1897); United States v. Lee, 106 U.S. 196 (1882). Unless he prevails on the merits of the sovereign immunity issue, defendant Bridges stands on the same footing as all other members of the defendant class, shares the common interest in defeating plaintiff's claim, and the Commonwealth cannot be affected by the outcome. If the Commonwealth wishes to protect its own interests as sovereign and potential third party defendant, it can intervene as the Commonwealth and represent its own interests separately and directly.

Defendant Bridges does not suggest any issue except sovereign immunity which differentiates him from any other defendant. Defendant's argument that his antagonism with respect to other members of the class bars certification here relies on cases in which the conflict went to the issues actually contested in the class action. Thus, in Lynch v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y. 1973), discussed in defendant's memorandum, the purported class

representative union in a sex discrimination case represented both members whose interests were opposed to the alleged discrimination, and members whose interests were served by that alleged discrimination. The antagonism went to the issues in dispute. Defendant Bridges has not shown, however, that he has any interest here with respect to plaintiff's claim, except to defeat that claim along with all other members of the defendant class. Antagonism between class members as to other issues than those in dispute is not material to the issue of adequate representation against the plaintiff. Berman v. Narragansett Racing Ass'n, 414 F.2d 311, 317 (1st Cir. 1969), cert.denied, 396 U.S. 1037 (1970).

Plaintiff submits that the action should proceed against defendant Bridges as an individual member of the defendant class unless and until said defendant establishes that the Commonwealth is the real party in interest. If the Commonwealth is determined to be the real party, and the action is not otherwise dismissed, then the Commonwealth ought to be separately represented as an individual defendant, not a member of the defendant class. If the Commonwealth chooses to intervene it ought to be separately represented. If the court determines that defendant Bridges must be separately represented because of antagonism with the defendant class, he should be designated as an individual defendant and not a class representative and the action should proceed simultaneously against the defendant class and defendant Bridges as an individual.

Dated: November 13, 1976
Boston, Massachusetts



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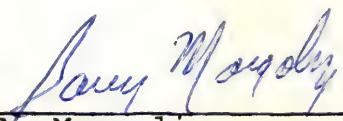
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Barry A. Margolin
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CLERK OF COURT
JAN 15 1 31 PM '76
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DISTRICT OF MASS.

MASHPEE TRIBE, :
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 PLAINTIFF, :
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 v. :
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 DEFENDANTS. :

DOCKETED

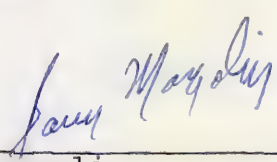
PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANT GREENWOOD DEVELOPMENT CORP.'S
MOTION TO APPOINT CLASS REPRESENTATIVE

Defendant Greenwood Development Corp. has moved to appoint its attorney, Thomas B. Shea, Esq., as attorney to represent all members of the defendant class, and has also moved by Attorney Shea for summary judgment. For the reasons set forth in support of Plaintiff's Motion for Class Certification, plaintiff believes that the defendant class will be adequately represented by the thirteen proposed class representatives who together claim roughly one quarter of the subject land, and their combined counsel, who include three of the major Boston law firms. The adequacy of representation will not be enhanced by addition of this defendant, which claims approximately .2% of the subject land and is apparently represented by a sole practitioner who is unlikely to have the resources to fully litigate the complex legal and historical issues raised by this action. On the face of this defendant's motions to appoint a class representative and for summary judgment, neither of which cite a single case or provide any supporting affidavits or other evidentiary facts, and which rely in important part on Massachusetts state law rather than federal law, it simply does not appear that defendant is

familiar with the somewhat specialized principles of federal Indian law and federal procedure upon which this action may turn.

As set forth in the Memorandum in Support of Plaintiff's Motion for Class Certification, at pages 6-7, this court has the power to designate those class representatives who would adequately represent the class and to prevent separate and duplicative participation by other members of the class. Since the interests of plaintiff and most defendants can best be served by expediting this litigation wherever possible, plaintiff believes that the court's power should be exercised by denying this defendant's motion and staying the action with respect to this defendant as an individual defendant, as proposed in Plaintiff's Motion for Class Certification.

Dated: November 11, 1976
Boston, Massachusetts



Barry A. Margolin
Native American Rights Fund
364 Boylston Street, 2nd floor
Boston, Massachusetts 02116
(617) 266-7505

Thomas N. Tureen
Dennis M. Montgomery
Native American Rights Fund
173 Main Street, P.O. Box 392
Calais, Maine 04619
(207) 454-2113

ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RECEIVED OFFICE
1 31 PM '76
DISTRICT COURT
DISTRICT OF MASS.

MASHPEE TRIBE,

PLAINTIFF,

v.

NEW SEABURY CORP., et al.,

DEFENDANTS.

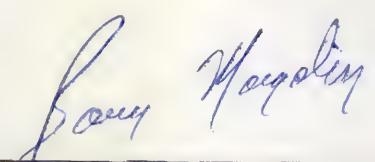
CIVIL ACTION 76-3190-S

DOCKETED

PLAINTIFF'S NOTICE OF OPPOSITION
TO DEFENDANT GREENWOOD DEVELOPMENT CORP.'S
MOTION TO APPOINT CLASS REPRESENTATIVE

Plaintiff Mashpee Tribe hereby provides notice of its opposition to defendant Greenwood Development Corp.'s motion to appoint Thomas B. Shea as attorney to represent the defendant class.

Dated: November 11, 1976
Boston, Massachusetts



Barry A. Margolin
Native American Rights Fund
364 Boylston St., 2nd floor
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I, Barry A. Margolin, attorney for plaintiff, certify that on the 15th day of November, 1976, I caused copies of the within Notice and supporting memorandum to be deposited, postage prepaid, in the United States Mail, addressed to:

1. Edwin J. Carr, Esq., May, Bilodeau, Dondis & Landergan, 294 Washington St., Boston, Mass. 02108
2. Paul H. Fitzgerald, Esq., 60 Batterymarch St., Rm. 1235, Boston Mass. 02110
3. Edward W. Kirk, Esq., Hunziker, McDermott & Kirk, 131 Main St., Falmouth, Mass. 02541
4. Eunice B. Jones, Martha E. Jones, 4 Garfield St., Natick, Mass.
5. Carol B. Jones, 1959 Commonwealth Ave., Brighton, Mass.
6. Clara L. Currier, 34 Linden St., Lawrence, Mass.
7. Alan A. Green, 171 Main St., P.O. Box 148, Hyannis, Mass. 02601
8. Clinton W. Lee, 311 Boston Post Rd., Wayland, Mass. 01778
9. Benjamin Nesson, Esq., 85 Devonshire St., Boston, Mass. 02109
10. William M. Wainwright, Esq., 1 Centre St., Brockton, Mass. 02401
11. Herbert J. Gorfinkle, Andrews Isle, Hingham, Mass. 02043
12. Thomas B. Shea, Esq., Gargiulo & Holian, 678 Mass. Ave., Cambridge, Mass. 02139
13. Frederick R.H. Witherby, Esq., 501 Boylston St., Boston, Mass. 02117
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17. Henry W. Keyes, Esq., Spencer & Stone, 50 Beacon St., Boston, Mass. 02108
18. Constance V. Vecchione, Esq., 203 West Elm St., Brockton, Mass. 02401
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20. William E. Crowell Jr., Esq., 49 Elm St., Hyannis, Mass. 02601
21. A. Russell Lucid Jr., Esq., Lucid & Lucid, 94 Washington St., Weymouth, Mass. 02188
22. Stephen H. Oleskey, James D. St. Clair, Esq., Hale & Dorr, 28 State St., Boston, Mass. 02109
23. Selma R. Rollins, Esq., Rollins, Rollins, & Fox, 1300 Boylston St., Brookline, Mass. 02167
24. Haskell Shapiro, Esq., 1 Court St., Boston, Mass. 02108
25. Donald F. Henderson, Esq., 776 Main St., Hyannis, Mass. 02601
26. Charles D. Kelley, Esq., 585 Pleasant St., Malden, Mass. 02148
27. Manuel Z. Sherman, Esq., 73 Tremont St., Boston, Mass. 02108
28. George Lemelman, Esq., Lemelman & Baker, 11 Beacon St., Boston Mass. 02108
29. William M. Noble Jr., Esq., 1357 Washington St., West Newton, Mass. 02155
30. Allan R. Rosenberg, Esq., Putnam, Bell & Russell, 53 State St., Boston, Mass. 02109
31. Andrew J. McElaney, Jr., Esq., Denzil McKenzie, Esq., Assistant Attorneys General, 1 Ashburton Place, Boston, Mass. 02108

32. Newton H. Levee, Esq., 140 Federal St., Boston, Mass.
33. Steven Murphy, Esq., Butterworth & McGhee, Route 28, Mashpee, Mass. 02649
34. George H. Lebherz Jr., Esq., Town Hall Sq., Falmouth, Mass.
35. Richard W. Renehan, Esq., Hill & Barlow, 225 Franklin St., Boston, Mass. 02110
36. Thomas V. Urmey, Esq., Warner & Stackpole, 28 State St., Boston, Mass. 02109
37. Sumner Babcock, Esq., Bingham, Dana & Gould, 100 Federal St., Boston, Mass. 02110
38. Raymond G. Sweeney, Esq., 28 State St., Boston, Mass. 02109

Barry Margolin

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,

Plaintiff

v.

NEW SEABURY CORP., et al.

Defendants

CIVIL ACTION
NO. 76-3190-S

NOTICE
JUL 5 52 PM '76
U.S. DISTRICT COURT
DISTRICT OF MASS.

DOCKETED

MEMORANDUM IN SUPPORT OF THE STATE DEFENDANT'S
OPPOSITION TO MOTION FOR CLASS CERTIFICATION

STATEMENT OF THE CASE

On August 26, 1976, plaintiff commenced this action against 146 named defendants, individually and as representatives of similarly situated landowners. Plaintiff is seeking possession of most of the land presently comprising the Town of Mashpee, and a small portion of the Town of Sandwich. Plaintiff grounds its claim on 25 U.S.C. §177, the so-called Non-Intercourse Act.

Colton H. Bridges, the Director of Fisheries and Wildlife of the Commonwealth of Massachusetts, is one of the named defendants. Defendant Bridges is a nominal defendant, however, and this action is in fact against the Commonwealth since plaintiff is seeking possession of land owned by the Commonwealth.

On October 18, 1976, plaintiff moved this Court pursuant to Rule 23(b)(1)(B), 23(c)(1), 23(d)(1), 23(d)(2) and 23(d)(3) of the Federal Rules of Civil Procedure, to certify this action as a defendant class action.

Appended to plaintiff's motion for class certification is a proposed order setting forth the composition of the class. Plaintiff's proposed order sets forth the names of thirteen defendants who are to serve as representatives of the class. The proposed order provides:

- (1) that the action with respect to the non-representative class members be stayed on the docket of this Court as to any issue not concluded by judgment but they be fully bound as to all issues concluded by judgment;
- (2) that no other pleading need be filed or served upon any non-representative defendant;
- (3) that James D. St. Clair, Esq. be designated as lead counsel for defendant class, and Barry A. Margolin be designated as lead counsel for plaintiff;
- (4) that lead counsel for plaintiff and defendants, respectively, be authorized to enter into agreements, stipulations, and admissions which shall be binding on all defendants and plaintiff respectively;
- (5) that all further pleadings and other papers required to be served upon parties to this action be served upon lead counsel for plaintiff and counsel for each representative defendant;
- (6) that within 60 days of entry of the proposed order notice by publication be given to all interested parties and notice by mail be given to each person named as a landowner on the most current published assessment roll in the Town of Mashpee;

- (7) that the Attorney General of the Commonwealth of Massachusetts be allowed to appear separately only for the purpose of asserting the defense of sovereign immunity and for no other purpose; provided that this shall not prejudice the rights of any class members to bring any additional claim against the Commonwealth;
- (8) that nothing in the proposed order shall prejudice the rights of any party to file any cross-claim or any counterclaim against any person or party pursuant to the Federal Rules of Civil Procedure;
- (9) that this Court enjoin plaintiff and defendant class from commencing any legal action in any other court to determine the issue of title to the lands in controversy in this action.

On October 22, 1976, the proposed class representative moved this Court pursuant to the provisions of Rules 12(b) and 19 of the Federal Rules of Civil Procedure, to dismiss this action. That motion is still pending.

On November 1, 1976, the Attorney General of the Commonwealth, on behalf of the Director of the Division of Fisheries and Wildlife, filed an opposition to plaintiff's motion for class certification. This memorandum is submitted in support of the Opposition.

ARGUMENT

The proposed order for class certification names 13 of 146 defendants as representatives of defendant class, but does not include the State Defendant as one such representative. In addition, the proposed order designates James D. St. Clair, counsel for the Town of Mashpee as lead counsel with full

authority to manage the lawsuit, and in so doing bind all defendants, including defendant Bridges and the Commonwealth, with his decisions. For some unstated reason, the proposed order prohibits the Attorney General of the Commonwealth from participating in any meaningful way in managing the litigation. In short, the proposed order requires that defendant Bridges and the Commonwealth be classified as any other landowner in the Town and be represented by counsel to the Town. For the reasons stated in the Opposition and discussed below, defendant Bridges and the Commonwealth oppose this proposed classification, and submit that the Court should not prohibit them from actively defending their interests.

I. THERE EXISTS A POTENTIAL CONFLICT
BETWEEN THE INTERESTS REPRESENTED
BY THE PROPOSED CLASS REPRESENTATIVES
ON THE ONE HAND, AND DEFENDANT BRIDGES
AND THE COMMONWEALTH ON THE OTHER HAND.

The Commonwealth's interests in the litigation differ from those of the non-representative defendants who are mere landowners. As has been recognized in the Motion to Dismiss filed by the proposed representative defendants, the Commonwealth may have a property interest in all of the subject land which would be superior to the interests of the defendants. Moreover, the Commonwealth may stand in the position of an insurer of the title of so much of the subject land which has been registered under state law. See generally, G.L. c. 185, §§101-04. Indeed,

the proposed lead counsel has been retained by a potential claimant against the Commonwealth under G.L. c. 185, §101. It can be seen therefore that the Commonwealth's interests not only differ from, but in fact may be adverse to, those of other defendants. Because of these adverse interests the potential conflict is obvious. The proposed order, however, ignores this potential conflict. Indeed, it prohibits the Commonwealth from protecting its unique interests and gives control of the Commonwealth's interests to the very parties whose interests may well be adverse to the Commonwealth's. The Commonwealth submits that the existence of these potential conflicts establishes that the requirements of Fed.R.Civ.P. 23 have not been met.

The burden is upon the party requesting a class action to show that the several requirements of Fed.R.Civ.P. 23 are satisfied. Rossin v. Southern Union Gas Company, 472 F.2d 707, 712 (10th Cir. 1973); see generally 7 C. Wright and A. Miller, Federal Practice and Procedure § 1770 p. 658 (1972) (hereinafter cited as Wright and Miller). In the instant case, plaintiff has failed to discharge its burden in that it has failed to satisfy Fed.R.Civ.P. 23(a)(4) which requires that there be no conflict or antagonism between the interests of the representative(s) and the persons he represents. Plekowski v. Ralston Purina Company, 68 F.R.D. 443, 652-653 (M.D. Ga. 1975); Gates v. Dalton, 67 F.R.D. 621 (C.D. Calif. 1975); Albertson v. Amalgamated Sugar Company, 503 F.2d 459, 463 (10th Cir. 1974); Lynch et al. v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y. 1973); Mersay v. First Republic Corporation of America, 63 F. 2d 465, 469 (S.D.N.Y. 1968); Wright and

Miller, supra, § 1775 p. 620. Where plaintiff fails, as here, to discharge its burden, the courts have uniformly denied certification of such classes. Plum Tree, Inc. v. Rouse Company, Inc., 68 F.R.D. 373, 377 (E.D. Penn. 1972); Plekowski v. Ralston Purina Co., supra;; Lamb v. United Security Life Company, 59 F.R.D. 25, 29 (S.D. Iowa 1972); Schy v. Susquehanna Corp., 419 F.2d 1112, 1116-7 (7th Cir. 1970) cert. den. 400 U.S. 726.

In Lynch v. Sperry Rand Corporation, supra, the plaintiffs, present and former employees of Sperry, suing on behalf of others similarly situated, and four local unions and their international, charged that Sperry's pension plans discriminated against male employees and retirees in favor of women in violation of federal laws. Sperry denied the allegations and challenged the union's ability to fairly and adequately represent the class it seeks to represent. Sperry pointed out that the unions represented both male and female employees and what was discriminatory to the male members was beneficial to the females. The court refused to grant the union's representative status on grounds that:

[t]he potential conflicts of interest . . .
[are] sufficiently serious and compelling to preclude a finding that the plaintiff unions will fairly and adequately protect the class interests. I hold that the union plaintiffs are not proper representatives of the Sperry male employees who will constitute the class and the unions will not be permitted to act as class representatives in this case.

In the instant case, the potential conflicts are at least as great, and the plaintiff's proposed composition of the defendant class fails to take into account these potential conflicts. Therefore, this Court should reject the proposed order and structure the class in such a manner so as to give the Commonwealth an opportunity to play an active role in the litigation of this lawsuit. For this Court to do otherwise is to work considerable hardship on the Commonwealth's ability to protect its unique interests, when no good reason for doing so has been advanced or is apparent.

II. THERE ARE AVAILABLE TO THE COMMONWEALTH POSSIBLE DEFENSES WHICH ARE NOT AVAILABLE TO THE PROPOSED CLASS REPRESENTATIVES, THE COMPLETE PRESENTATION OF WHICH MAY WELL REQUIRE ACTIVE PARTICIPATION AS A PARTY THROUGHOUT THE LITIGATION.

The proposed order recognizes that the Commonwealth has at least one possible defense, namely, sovereign immunity, which is not available to the proposed class representatives. Because the Commonwealth is a sovereign and because its relationship with the United States differs from that of an individual citizen, there may well be other legal and factual defenses which are available only to the Commonwealth. The proposed order precludes the Commonwealth from asserting any of its unique defenses other than sovereign immunity, and should be rejected for this reason.

It should also be noted that this defect in the proposed order cannot be cured simply by amending the order now and listing the defenses unique

to the Commonwealth. To do so would require the Commonwealth to assert now any potential legal or factual defense. The Commonwealth cannot reasonably be asked to do so. This litigation involves a complex and esoteric area of the law. It also involves almost two hundred years of history. Only after lengthy legal and factual research will the Commonwealth be in a position to know and assert all its possible defenses. Only after allowing sufficient time for this research can this Court be satisfied that the issues have been fully explored and the Commonwealth given a fair hearing. Of course, if the Commonwealth is precluded from participating in discovery it may never learn of factual defenses available to it.

Since the Commonwealth may have unique legal and factual defenses and since it would be unreasonable to require the Commonwealth to assert now, for all time, those possible defenses, equity and justice require that the Commonwealth be allowed to participate actively in this litigation.

III. THE ATTORNEY GENERAL IS THE PRINCIPAL
LEGAL OFFICER OF THE COMMONWEALTH OF
MASSACHUSETTS AND AS SUCH HE IS
STATUTORILY OBLIGATED TO REPRESENT
THE COMMONWEALTH IN ALL LEGAL PRO-
CEEDINGS COMMENCED AGAINST IT.

The Attorney General of the Commonwealth is obligated by statute to defend the Commonwealth, its officers and agencies, in suits and proceedings brought against them. G.L. c. 12, §3 provides:

The Attorney General shall appear for the Commonwealth, and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested All such suits and proceedings shall be prosecuted and defended by him or under his direction (Emphasis added.)

In construing this statute, the Supreme Judicial Court of Massachusetts recently stated: "We hold that the Attorney General, as 'chief law officer of the Commonwealth' . . . has control over the conduct of litigation involving the Commonwealth" Secretary of Administration and Finance v. Attorney General, 1975 Mass. Adv. Sh. 665, 671, 326 N.E 2d 334,335.

Plaintiff proposes that this Court override the statutory obligations of the Attorney General by requiring him to participate in litigation over which he has no control and by transferring his responsibility of defending the interests of defendant Bridges and the Commonwealth to an attorney who is not subject to the direction or control of the Attorney General. Defendant Bridges and the Commonwealth submit that this proposition is legally unsound in that it tramples on well-established principles of comity and federalism. Cf. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and 28 U.S.C. § 2403(b) (in action challenging the constitutionality of a state statute, the District Court must notify the state attorney general and permit the state to intervene). Indeed, plaintiff's proposal is particularly unsound in this case since no reason has been advanced for preventing the Attorney General from fulfilling his statutory obligations. This Court should reject the proposed order and allow the Attorney General to participate actively in defending the interests of defendant Bridges and the Commonwealth.

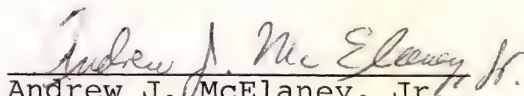
CONCLUSION

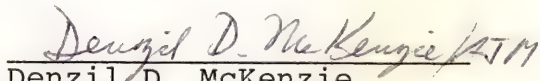
For the reasons stated above, the Court should not enter the proposed order but should modify it to exclude defendant Bridges from the class of non-representative defendants and to allow the Attorney General to participate fully in the litigation.

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Dated: November 10, 1976

Department of the
Attorney General
One Ashburton Place
Room 2019
Boston, MA 02108
Tel.: 727-1031


Andrew J. McElaney, Jr.
Assistant Attorney General


Denzil D. McKenzie
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Andrew J. McElaney, Jr., certify that on November 10, 1976, I caused copies of the within Memorandum to be mailed, postage prepaid, to the following:

Barry A. Margolin, Esquire
Native American Rights Fund
364 Boylston Street, 2nd Floor
Boston, Massachusetts 02166
Attorney for Plaintiff

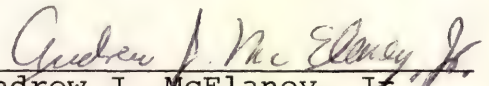
James D. St. Clari, Esquire
Hale & Dorr
28 State Street
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Attorney for Town of Mashpee,
Maurice A. Cooper and John D. Ferguson

Selma R. Rollins, Esquire
Rollins, Rollins & Fox
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Attorney For New Seabury Corp.,
New Seabury Conveyancing Corp., and
Fields Point Manufacturing Corp.

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Attorney for First Pennsylvania
Mortgage Trust.

Sumner Babcock, Esquire
Bingham, Dana & Gould
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Attorney for Leonard W. Peck and
Margaret Peck

Thomas Otis, Esquire
Vance, Sanders & Co.
1 Beacon Street
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Attorney for Thomas Otis, William M.
Atwood, Russell Makepeace, and Maurice Makepeace.


Andrew J. McElaney, Jr.
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,

Plaintiff,

v.

NEW SEABURY CORP, ET AL,

Defendants.

CIVIL ACTION

No. 76-3190-S

DISTRICT COURT
DISTRICT OF MASS

DOCKETED

SUGGESTION OF SUCCESSION
TO PUBLIC OFFICE

Matthew B. Connolly, Jr., suggests to the Court that on December 20, 1976, he became Director of the Division of Fisheries and Wildlife of the Commonwealth, succeeding Colton H. Bridges.

Dated: March 10, 1977

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Department of the Attorney
General
One Ashburton Place
Boston, MA 02108
727-1031

Andrew J. McElaney, Jr.
Andrew J. McElaney, Jr.
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Andrew J. McElaney, Jr., certify that on March 10, 1977, I caused copies of the within Suggestion to be mailed, postage prepaid, to the following:

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Attorney for Plaintiff

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Morris Kirsher, Esquire
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Attorneys for Town of Mashpee,
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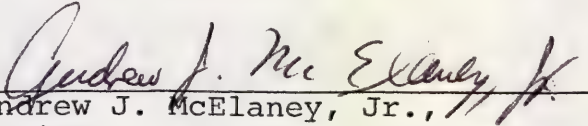
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New Seabury Conveyancing Corp., and
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Atwood, Russell Makepeace, and
Maurice Makepeace.

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Garriulo & Holian
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Cambridge, Massachusetts 02139
Attorney for Greenwood Development
Corp.



Andrew J. McElaney, Jr.,
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT | 31 PM '76
FOR THE DISTRICT OF MASSACHUSETTS
DISTRICT COURT
NEW MASS.

MASHPEE TRIBE, :
 :
 PLAINTIFF, :
 :
 v. : CIVIL ACTION 76-3190-S
 :
 NEW SEABURY CORP., et al., :
 :
 DEFENDANTS. :

DOCKETED

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANT GREENWOOD DEVELOPMENT CORP.'S
MOTION FOR SUMMARY JUDGMENT

Defendant Greenwood Development Corp. has filed a motion for summary judgment "on behalf of unnamed persons not members of the Mashpee Tribe who assert an interest in any portion of the subject land". This motion is unsupported by any affidavits or other evidentiary materials within the scope of Rule 56(c) of the Federal Rules of Civil Procedure, and contains no citations to any decided authority. The motion is plainly frivolous. Defendant states three grounds for summary judgment. The first ground appears to argue that by 1870 the statutes of Massachusetts had given the Mashpee Tribe or its members an unrestricted right to alienate the subject land. While it is probably correct that the Massachusetts statutes of 1869 and 1870 cited by defendant purported to give the plaintiff or its members the right to convey some portions of the subject land, that fact is irrelevant. If plaintiff establishes that this land was tribal property subject to the Nonintercourse Act, no state legislation could authorize conveyances prohibited by federal law.

Neither the constitution of the State nor any act of its legislature, however formal or solemn,

whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of Congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislation of the State the supreme law of the land, instead of the Constitution of the United States, and the laws and treaties made in pursuance thereof. United States v. Holliday, 70 U.S. (3 Wall.) 407, 419-420 (1865).

See also, McClanahan v. State Tax Commission, 411 U.S. 164, 168-173 (1973); Williams v. Lee, 358 U.S. 217, 220 (1959).

Defendant's allegations based on state laws have no bearing on the issues in this action.

Defendant's second ground for summary judgment is that any individual Indian "who had title and fee" had a right to convey his land because the Nonintercourse Act applied only to Indian tribes, not to individual Indians. That proposition is true but is again irrelevant. Defendant has not shown that any individual Indian held the fee to any particular land, and none of the cited state statutes authorized the setting off of any tribal land to members of the tribe before 1790. Defendant has not contradicted plaintiff's allegations that all of the subject land was tribal property as of 1790 and was thereafter alienated from the tribe without federal approval. Indian title is held by the tribe even though the individual members may have the right to separately occupy a portion of the land under tribal law; the members have no private ownership rights until the land is allotted or the tribe dissolved by federal statute. See, Franklin v. Lynch, 233 U.S. 269, 271 (1914); Cherokee Trust Funds, 117 U.S. 288, 308 (1885); Shulthis v. McDougal, 170 F. 529, 533-534 (8th Cir. 1909), app. dismiss., 225 U.S. 561 (1912). Generally,

The reservation lands are held in common by the tribe, although individual members may be in possession of a particular tract, and such possession is recognized by the tribe. But the lands are inalienable except with

the concurrence and consent of the United States. An individual member cannot convey title to any particular tract of reservation lands. United States v. Charles, 23 F.Supp. 346 (W.D.N.Y. 1938).

Accord, United States v. Boylan, 265 F. 165, 174 (2nd Cir. 1920), err. dism. 257 U.S. 614. Defendant has not explained why a different rule applied in Mashpee.

Defendant's final argument is that an 1870 census would, if it were part of the record, state that only 2 out of 372 Mashpee residents in 1870 were Indians. The motion does not show what definition of "Indian" was employed by the census taker, but the official "Instructions to Assistant Marshals" for the 1870 census required them to list as mulattoes, rather than Indians, any Indian who had any amount of black ancestry.¹ Plaintiff tribe does not contend that its members have never married non-Indians nor that they are "full-blood" Indians. Plaintiff only contends, and will prove, that it is a tribe of Indians as that term is generally used in federal Indian law. For purposes of federal law, except when otherwise specifically defined for purposes of a particular statute, an Indian is an individual of some Indian ancestry who holds himself out or is identified as an Indian in his Indian community. United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976); Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 942-943 (Ct. Cl. 1974). Beyond that basic definition, each tribe has the right to define for itself

¹/ The 1870 Census instructions directed the Assistant Marshals: Be particularly careful in reporting the class Mulatto. The word is generic, and includes quadroons, octaroons, and all persons having any perceptible trace of African blood.

CARROLL D. WRIGHT, THE HISTORY AND GROWTH OF THE UNITED STATES CENSUS 157 (Wash. D.C. 1900). Most Mashpee residents in 1870 were reported in the overall compilation as "colored", including "mulattoes".

its membership criteria unless otherwise provided by federal law. Baciarelli v. Morton, 481 F.2d 610, 612 (9th Cir. 1973); Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (10th Cir. 1966); Martinez v. Southern Ute Tribe, 249 F.2d 915, 920 (10th Cir. 1957). See, Rolf v. Burney, 168 U.S. 218, 222 (1897).

In what was thus a more relevant census of the plaintiff tribe by the Commonwealth in 1859, 403 names were returned, of whom 371 were natives and remainder married to natives; all but 14 continued to be recognized as members by the tribe. JOHN M. EARLE, REPORT TO THE GOVERNOR AND COUNCIL CONCERNING THE INDIANS OF THE COMMONWEALTH UNDER THE ACT OF APRIL 6, 1859, at 46-47 (see Attachment "A"). And forty years after the 1870 census, a special 1910 federal census of Indian tribes and population reported 206² Indians in the Mashpee Tribe. (See attachment "B"). The members of the plaintiff tribe continue to this day to be identified as Indians by the Commonwealth and by various agencies of the United States charged with providing services to Indian communities; representatives of the tribe sit on the Massachusetts Commission on Indian Affairs and the Indian Task Force of the Federal Regional Council. Whatever other issues may exist as to plaintiff's tribal status, the identity of its members as Indians is not seriously challenged by this 1870 census which apparently applied some other test of Indianness than that which is relevant to this action.

Defendant's motion provides no relevant facts to support its request for summary judgment, and the motion should be denied.

2/ Plaintiff tribe, along with most other Indian tribes in the United States, believes that the federal censuses have historically been erratic in their approach to the Indian population and have continually underestimated that population; plaintiff does not concede that the federal census provides an accurate measure of tribal population.

Dated: November 13, 1976
Boston, Massachusetts

Barry Margolin

Barry A. Margolin
Native American Rights Fund
364 Boylston St., 2nd floor
Boston, Massachusetts 02116
(617) 266-7505

Thomas N. Tureen
Dennis M. Montgomery
Native American Rights Fund
173 Main Street, P.O. Box 392
Calais, Maine 04619
(207) 454-2113

ATTORNEYS FOR PLAINTIFF

ATTACHMENT "A": excerpt from JOHN M. EARLE, REPORT TO THE
GOVERNOR AND COUNCIL CONCERNING THE INDIANS OF THE COMMON-
WEALTH UNDER THE ACT OF APRIL 6, 1859

120

SENATE.....

.....No. 96.

REPORT

TO THE

GOVERNOR AND COUNCIL,

CONCERNING THE

Indians of the Commonwealth,

UNDER THE ACT OF APRIL 6, 1859.

By JOHN MILTON EARLE,
COMMISSIONER.

BOSTON:
WILLIAM WHITE, PRINTER TO THE STATE.
1861.

Commonwealth of Massachusetts.

EXECUTIVE DEPARTMENT, COUNCIL CHAMBER, }
BOSTON, March 8, 1861.

To the Honorable the House of Representatives :—

I herewith transmit for the information of the General Court, the Report concerning the Indians domiciled in this Commonwealth, made by the Commissioner appointed in accordance with the provisions of chapter 266 of the Acts of the year 1859.

JOHN A. ANDREW.

with even paternal solicitude, counselling them in their need, adjusting disputes between them and their white neighbors, and between each other, with many other acts of kindness of various kinds, for all which, he has constantly refused any compensation from them. This unselfish kindness has endeared him to them, and won their entire confidence, so that he has an influence with them that none other can possess, and, when he is gone his memory will be cherished as a benefactor, and none, it is feared, will be left to fill the place vacated by him.

Since my Report was completed, I have ascertained that the annual grant of sixty dollars to the Gay Head school for five years, expired in 1850, and, believing that the reasons which prompted its first appropriation have acquired increased force, and will commend themselves to the legislature, I have reported a resolve for extending the grant for another term of ten years.

MARSHPEE TRIBE.

The District of Marshpee, the residence of the largest distinct body of the descendants of the Indians, now remaining in the State, is situated on Cape Cod, in the westerly part of Barnstable County, and is bounded on the north by Sandwich and Barnstable, on the east by Barnstable, on the west by Fal-mouth, and on the south by the waters of the Vineyard Sound. The whole number of the tribe, so far as is ascertained, is 403.

Families,	.	.	.	.	.	.	.	.	93
Males,	.	.	.	.	.	.	.	.	186
Females,	.	.	.	.	.	.	.	.	216
Unknown,	.	.	.	.	.	.	.	.	1
Natives,	.	.	.	.	.	.	.	.	371
Foreigners,	.	.	.	.	.	.	.	.	32
Under 5 years of age,	.	.	.	.	.	.	.	.	50
From 5 to 10 years of age,	.	.	.	.	.	.	.	.	44
“ 10 to 21 years of age,	.	.	.	.	.	.	.	.	97
“ 21 to 50 years of age,	.	.	.	.	.	.	.	.	146
“ 50 to 70 years of age,	.	.	.	.	.	.	.	.	46
Of 70 and over,	.	.	.	.	.	.	.	.	20

Of those who are 70 or over, six are 70 years old, one is 71, one is 74, four are 75, three are 76, two are 77, one is 87, and two are each 93 years of age. The two oldest persons are Lois Pells and Betsy Smith, both widows.

It appears by a statement made before a committee of the legislature in 1834, by Hon. Benj. F. Hallett, counsel for the tribe, that their population in 1767 was two hundred and ninety-two; in 1771, it was three hundred and twenty-seven, of whom fourteen were negroes, married to Indians; in 1832 it was three hundred and fifteen, of whom sixteen were negroes. By the commissioners' report in 1849, it was three hundred and five in 1848, of whom twenty-six were foreigners, all negroes or mulattoes; in 1859, the tribe numbered, as will be seen by this report and the accompanying tabular list, four hundred and three, including thirty-two foreigners, married to natives of the tribe, all negroes or mulattoes, or various mixtures of negro, Indian, or white blood—none of them being pure whites. Sixty-six, out of the whole number of the tribe, at the time of the enumeration, were not residents of the District; but fifty-two of them were considered as retaining their rights in the tribe, and more than half of the sixty-six were understood to be only temporary residents abroad, expecting, at some time, to return to Marshpee, and make it their permanent place of residence. A few others, as a matter of personal convenience, are now residing just over the line, and are so returned, but they consider themselves as identified with the tribe in all respects, and are so considered by the tribe. Fourteen individuals, included in the above sixty-six, whose names are in the "Supplementary List," own no land in the District, but have been gone so long from it, that they are not now recognized by residents as members of the tribe.

In this tribe, as in several of the others, the mortality, within the eleven years preceding, and including the autumn of 1859, was very great. The commissioners' list made in 1848 gives the names of three hundred and five persons, and of these, ninety-two, or 30 per cent. of the whole number were dead in 1859. The number of births during that period, and of deaths of those born within the time, are not known. But there were one hundred children living in 1859, who had been born since the commissioners' report, being an excess over the deaths of only eight. The additional excess in numbers, of the present

ATTACHMENT "B": excerpt from DEPARTMENT OF COMMERCE, BUREAU OF
THE CENSUS, INDIAN POPULATION IN THE UNITED STATES AND ALASKA:
1910

DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

SAM. L. ROGERS, DIRECTOR

INDIAN POPULATION
IN THE
UNITED STATES AND
ALASKA

1910



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WASHINGTON
GOVERNMENT PRINTING OFFICE
1915

POPULATION.

15

NUMBER OF INDIANS REPORTED ON SPECIAL INDIAN SCHEDULE, CLASSIFIED BY LINGUISTIC STOCKS AND TRIBES: 1910.

Table 8		Linguistic Stock and Tribe		Linguistic Stock and Tribe		Linguistic Stock and Tribe	
Linguistic Stock and Tribe	Number	Linguistic Stock and Tribe	Number	Linguistic Stock and Tribe	Number	Linguistic Stock and Tribe	Number
UNITED STATES.							
Total.....	247,137	CHINOOKAN STOCK.....	897	LUTUAMIAN STOCK.....	978	SHANAPTIAN STOCK—Contd.	
ALGONQUIAN STOCK.....	40,975	Chinook.....	315	Klamath.....	696	Topinsh.....	47
Abnaki.....	37	Clackamas.....	40	Modoc.....	282	Umatilla.....	272
Arapaho.....	1,419	Clatsop.....	26	MAIDU STOCK (syn. Pujunan).....	1,100	Wallawalla.....	397
Blackfeet (syn. Siksiika).....	172	Wasco.....	242	Maidu (syn. Nishnam).....	1,100	Warm Springs (syn. John Day, Tenino, Tyigh, Des Chutes).....	550
Brotherton.....	99	Wishram (syn. Tum-water).....	274	MIWOK STOCK (syn. Moquel-umnan).....	699	Yakima.....	1,362
Cheyenne.....	3,055	CHITIMACHAN STOCK.....	69	Marh.....	22	Not reported.....	17
Chickahominy.....	115	Chittimaacha.....	69	Middle Town.....	7	SHASTAN STOCK.....	1,578
Chippewa (syn. Ojibway).....	20,214	CHUMASHAN STOCK.....	38	Miwok.....	670	Hat Creek.....	240
Cree.....	459	San Luis Obispo.....	1	MUSKHOGEAN STOCK.....	29,191	Pit River.....	985
Delaware.....	914	Santa Barbara.....	2	Alibamu.....	298	Shasta.....	353
Gros Ventres (syn. Atsina).....	510	Santa Ynez.....	35	Chickasaw.....	4,204	SHOSHONEAN STOCK.....	16,842
Kickapoo.....	348	COSTANOAN STOCK.....	17	Choctaw.....	15,917	Bannock.....	413
Malecite.....	142	Santa Cruz.....	17	Creek.....	6,945	Chemohuevi.....	355
Mashpee.....	206	CROATAN GROUP.....	5,865	Konati.....	88	Comanche.....	1,171
Mattaponi.....	1	Croatan.....	5,865	Seminole.....	1,729	Gabrieleno (syn. San Gabriel).....	11
Menominee.....	1,422	ESKIMAUAN STOCK.....	56	PIMAN STOCK.....	8,607	Hopi (syn. Moqui, Koso).....	2,009
Miami.....	22	Alut.....	40	Mayo.....	40	Juaneno (syn. San Juan Capistrano).....	16
Micmac.....	22	Malenit.....	2	Opata.....	5	Kawaisu.....	23
Mohegan.....	29	Not reported.....	14	Papago.....	3,798	Kawia (syn. Cahulla).....	755
Montauk.....	71	HAIDAN STOCK (syn. Skittagetan).....	31	Pima.....	4,236	Kern River.....	105
Munsee.....	16	Haida.....	31	Yaqui.....	528	Mono.....	1,448
Narraganset.....	1	IROQUOIAN STOCK.....	39,679	POMO STOCK (syn. Kulapan).....	1,193	Pahvant.....	37
Niantic.....	1	Cayuga.....	81	Clear Lake.....	193	Paiute.....	780
Ottawa.....	2,717	Cherokee.....	31,489	Gymnochro (syn. Gallinero).....	33	Panamint.....	10
Pamunkey.....	83	Mohawk.....	308	Little Lake.....	94	Paviotso (syn. Snake).....	3,038
Passamaquoddy.....	386	Oneida.....	2,436	Lower Lake.....	96	San Luiseno (syn. Luiseño).....	467
Penobscot.....	128	Onondaga.....	365	Pomo.....	777	Serano.....	118
Peoria.....	66	St. Regis.....	1,219	SALINAN STOCK.....	16	Shoshoni.....	3,840
Pequot.....	2	Seneca.....	2,907	San Antonio.....	16	Tehachapi.....	2
Plankashaw.....	2,268	Tuscarora.....	400	SALISHAN STOCK.....	7,833	Ute.....	12,244
Plekan.....	1	Wyandot (syn. Huron).....	353	Bellacoola.....	2	SIHOAN STOCK.....	32,941
Poosepatuck.....	1	Not reported.....	61	Chehalis (syn. Hump-tulip, Satsop, George-town).....	282	Assiniboin.....	1,253
Potawatomi.....	2,440	KALAPOOIAN STOCK.....	106	Chillam.....	398	Catawba.....	124
Powhatan.....	131	Kalapool.....	5	Coeur d'Alene.....	293	Crow (syn. Absaraka).....	1,799
Sauk and Fox.....	724	Lakmiut.....	8	Columbia (syn. Sinkiuse).....	385	Ildata (syn. Gros Ventres, Minitar).....	547
Shawnee.....	1,338	Mary's River (syn. Che-pennaf).....	24	Colville (syn. Senjextee).....	785	Iowa.....	244
Shinnecock.....	167	Santiam.....	9	Comox.....	1	Kansa.....	238
Stockbridges.....	533	Wapato (syn. Atlatat).....	44	Cowichan.....	62	Mandan.....	209
Wampanoag.....	162	Yamell.....	5	Cowlitz.....	105	Missouri.....	13
Wes.....	4	Yonkalla.....	11	Dwamish.....	20	Omaha.....	1,105
Not reported.....	36	KAROK STOCK (syn. Quoratan).....	775	Flathead (syn. Salish).....	486	Osage.....	1,373
ATHAPASKAN STOCK.....	30,406	Orleans (syn. Karok).....	775	Kallspeil (syn. Pend d'Oreilles).....	564	Oto.....	332
Ahtena.....	2	KERESAN STOCK.....	4,027	Lummi.....	353	Ponca.....	875
Apache.....	14,973	Acoma.....	691	Methow.....	14	Quapaw.....	231
Chastacosta.....	7	Cochiti.....	237	Muckleshoot.....	194	Santee Sioux (syn. Wah-petka Sioux, Mdewa-kanton Sioux).....	1,539
Chetco.....	9	Laguna.....	1,472	Nespelem.....	46	Sioux.....	996
Cow Creek.....	9	San Felipe.....	490	Nisqualli.....	137	Sisseton Sioux (syn. Sisseton-Wahpeton Sioux, Wahpeton Sioux).....	2,514
Hupa.....	639	Santa Ana.....	211	Nooksak.....	272	Teton Sioux.....	14,284
Jicarilla Apache.....	694	Santa Dominga.....	817	Okhagan.....	52	Winnebago.....	1,820
Kal-Pomo (syn. Kato, Cahito).....	51	Sia.....	109	Pisquow.....	43	Yankton Sioux.....	2,088
Kiowa Apache.....	139	KIOWAN STOCK.....	1,126	Puyallup.....	288	Yanktonai Sioux (syn. Pabaksa Sioux).....	1,357
Lipan Apache.....	28	Kiowa.....	1,126	Quinalt.....	240	TAKELMAN STOCK.....	1
Mattole.....	34	KUSAN STOCK.....	93	Shwap.....	9	Takelma.....	1
Mescalero Apache.....	424	Kutenai (Kutenay, Kootenai).....	538	Skagit.....	56	TANOAN STOCK.....	3,140
Navajo (syn. Navaho).....	22,455	Not reported.....	93	Skokomish.....	195	Telet.....	956
Redwood (syn. Whilkut).....	76	SHANAPTIAN STOCK.....	4,391	Snoqualmie.....	664	Tezcu.....	499
Rogue River (syn. Tututni).....	883	Kilklat.....	405	Songish.....	23	Namab.....	88
Salas.....	6	Nez Perces.....	1,259	Spokan.....	643	Pecos.....	10
Tamankutchin.....	1	Paloos.....	82	Squaxon.....	44	Picuris.....	104
Tlatkanal.....	8	CHIMARIKAN STOCK.....	81	Sugamish.....	307	Pojaque.....	16
Tolowa (syn. Crescent City, Smith River Indians).....	121	Chimakum.....	3	Swinomish.....	333	San Ildefonso.....	123
Umpqua.....	109	Hoh.....	44	Tillamook.....	25	San Juan.....	387
Upper Coquille.....	15	Quileute.....	259	Twana.....	61	Sandia.....	73
Wallaki.....	227	CHIMARIKAN STOCK.....	81	Not reported.....	13	Santa Clara.....	277
Not reported.....	1	Chimariko.....	81			Taos.....	517
CADDOAN STOCK.....	1,863					Tesque.....	77
Arkara.....	444					Not reported.....	13
Caddo.....	452					TARASCAN STOCK.....	1
Kichai.....	10						
Pawnee.....	633						
Tawakoni.....	1						
Waco.....	6						
Wichita.....	318						

1 Includes Chiricahua Apache, Coyotero Apache, San Carlos Apache, Tonto Apache, and White Mountain Apache.
 2 Includes Capote Ute, Grand River Ute, Moache Ute, Southern Ute, Uinta Ute, Uncompahgre Ute, White River Ute, and Wiminuchi Ute.
 3 Includes Brule Sioux, 806; Hunkpapa Sioux, 1,072; Minneconjou Sioux, 397; Ogila Sioux (syn. Lower Sioux), 6,045; Sans Arc Sioux, 222; Sisseton (syn. Blackfoot Sioux), 486; Two Kettle Sioux, 293; and other Teton Sioux, 4,964.

CERTIFICATE OF SERVICE

I, Barry A. Margolin, attorney for plaintiff, certify that
on the day of , 1976, I caused copies of the
within
to be deposited, postage prepaid, in the United States Mail,
addressed to:

1. Edwin J. Carr, Esq., May, Bilodeau, Dondis & Landergan, 294
Washington St., Boston, Mass. 02108
2. Paul H. Fitzgerald, Esq., 60 Batterymarch St., Rm. 1235, Boston
Mass. 02110
3. Edward W. Kirk, Esq., Hunziker, McDermott & Kirk, 131 Main St.,
Falmouth, Mass. 02541
4. Eunice B. Jones, Martha E. Jones, 4 Garfield St., Natick, Mass.
5. Carol B. Jones, 1959 Commonwealth Ave., Brighton, Mass.
6. Clara L. Currier, 34 Linden St., Lawrence, Mass.
7. Alan A. Green, 171 Main St., P.O. Box 148, Hyannis, Mass. 02601
8. Clinton W. Lee, 311 Boston Post Rd., Wayland, Mass. 01778
9. Benjamin Nesson, Esq., 85 Devonshire St., Boston, Mass. 02109
10. William M. Wainwright, Esq., 1 Centre St., Brockton, Mass.
02401
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13. Frederick R.H. Witherby, Esq., 501 Boylston St., Boston, Mass.
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17. Henry W. Keyes, Esq., Spencer & Stone, 50 Beacon St., Boston,
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28. George Lemelman, Esq., Lemelman & Baker, 11 Beacon St., Boston
Mass. 02108
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Mass. 02155
30. Allan R. Rosenberg, Esq., Putnam, Bell & Russell, 53 State St.,
Boston, Mass. 02109
31. Andrew J. McElaney, Jr., Esq., Denzil McKenzie, Esq., Assistant
Attorneys General, 1 Ashburton Place, Boston, Mass. 02108

32. Newton H. Levee, Esq., 140 Federal St., Boston, Mass.
33. Steven Murphy, Esq., Butterworth & McGhee, Route 28, Mashpee, Mass. 02649
34. George H. Lebherz Jr., Esq., Town Hall Sq., Falmouth, Mass.
35. Richard W. Renehan, Esq., Hill & Barlow, 225 Franklin St., Boston, Mass. 02110
36. Thomas V. Urmy, Esq., Warner & Stackpole, 28 State St., Boston, Mass. 02109
37. Sumner Babcock, Esq., Bingham, Dana & Gould, 100 Federal St., Boston, Mass. 02110
38. Raymond G. Sweeney, Esq., 28 State St., Boston, Mass. 02109

Barry A. Margolin
Native American Rights Fund
364 Boylston St., 2nd floor
Boston, Mass. 02116
(617) 266-7505

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Nov 9 2 43 PM '76

DISTRICT COURT
DISTRICT OF MASS.

MASHPEE TRIBE,	:	
	:	
PLAINTIFF,	:	
	:	
v.	:	Civil Action No. 76-3190-S
	:	
NEW SEABURY CORP., <u>et al.</u> ,	:	
	:	
DEFENDANTS.	:	

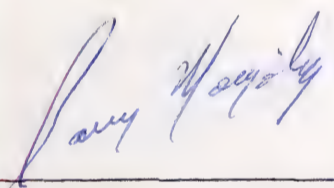
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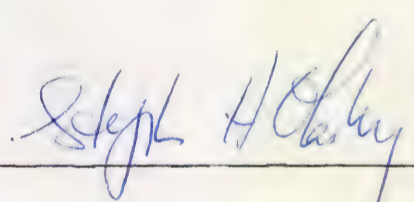
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Plaintiff Mashpee Tribe and defendants Town of Mashpee, et al., by their respective attorneys, hereby agree and stipulate that the time for plaintiff's response to the Motion to Dismiss of defendants Town of Mashpee, et al., is extended to and until November 19, 1976.

Plaintiff, Mashpee Tribe, by

Defendants, Town of Mashpee, et al., by





BARRY A. MARGOLIN
Native American Rights Fund
364 Boylston St., 2nd Floor
Boston, MA 02116

Hale & Dorr
28 State Street
Boston, MA 02109

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NOV 3 12 27 PM '76
DISTRICT COURT
DISTRICT OF MASS.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,

PLAINTIFF,

v.

NEW SEABURY CORP., et al.,

DEFENDANTS.

Civil Action No. 76-3190-S

APPEARANCE ON BEHALF OF THE
DEFENDANT, MARY JANE SHOOP

Please enter my Appearance on behalf of the defendant
MARY JANE SHOOP, with respect to the above entitled action.

Dated: November 3 1976
Boston, Massachusetts

Defendant Mary Jane Shoop
By her attorney,
By Lawrence F. Scofield, Jr.
Lawrence F. Scofield, Jr.
Fourth Floor
70 Federal Street
Boston, Mass. 02110
(617) 482-2311

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 76-3190-S

MASHPEE TRIBE

Plaintiff

V.

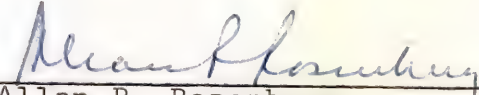
NEW SEABURY CORP., et al

Defendants

OPPOSITION TO PLAINTIFF'S
MOTION FOR CLASS CERTIFICATION

Defendant Manuel Beckwith hereby opposes Plaintiff's Motion
for Class Certification served October 21, 1976.

By his attorney,


Allan R. Rosenberg
Putnam, Bell and Russell
53 State Street
Boston, Massachusetts 02109
(617) 723-3131

CERTIFICATE OF SERVICE

I hereby certify that I served the within Opposition to
Plaintiff's Motion for Class Certification on the attorney for
plaintiff by mailing a copy of same to Barry A. Margolin, Esq.,
at 364 Boylston Street, Second Floor, Boston, Massachusetts 02116,
by regular U.S. mail, postage prepaid, this second day of November,
1976.


Allan R. Rosenberg

DOCKETED

NOV 2 4 50 PM '76
DISTRICT OF MASS
CLERK'S OFFICE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CLERK'S OFFICE
NOV 2 1 03 PM '76

DISTRICT COURT
DISTRICT OF MASS.

MASHPEE TRIBE,
Plaintiff,

v.

NEW SEABURY CORP., et al.,
Defendants.

CIVIL ACTION NO. 76-3190-S

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 12(c), Defendant Bridges requests oral argument on his opposition to Plaintiff's Motion for Class Certification. Defendant Bridges believes that no more than one (1) hour will be necessary for the parties to be heard.

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Andrew J. McElaney, Jr.
Andrew J. McElaney, Jr.
Assistant Attorney General

Denzil McKenzie
Denzil McKenzie
Assistant Attorney General

One Ashburton Place, Room 2019
Boston, Massachusetts 02108
Tel.: 727-1031

DOCKETED

(67)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN CLERK'S OFFICE
NOV 2 1 03 PM '76
DISTRICT COURT
DISTRICT OF MASS.

MASHPEE TRIBE,
Plaintiff,

v.

NEW SEABURY CORP., et al.,
Defendants.

CIVIL ACTION NO. 76-3190-S

OPPOSITION TO PLAINTIFF'S MOTION FOR
CLASS CERTIFICATION

DOCKETED

Pursuant to Rule 12(a)(2) of the Local Rules of this Court, Colton H. Bridges, Director of the Division of Fisheries and Wildlife of the Commonwealth of Massachusetts, by his attorney, the Attorney General of the Commonwealth, hereby opposes Plaintiff's Motion for Class Certification.

Defendant Bridges is a nominal defendant and this action is in fact against the Commonwealth since plaintiff is seeking possession of land owned by the Commonwealth. Defendant Bridges and the Commonwealth do not generally oppose the certification of this action as a defendants' class action, but do oppose the proposed Order of class certification for the following reasons:

(1) There exists a potential conflict between the interests represented by the proposed class representatives and the proposed lead counsel on the one hand, and Defendant Bridges and the Commonwealth on the other hand.

66

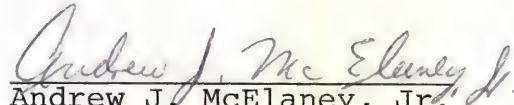
(2) There are available to Defendant Bridges and the Commonwealth possible defenses which are not available to the proposed class representatives, the complete presentation of which may well require active participation as a party throughout the litigation.


(3) Defendant Bridges and the Commonwealth are represented by the Attorney General of the Commonwealth who is statutorily obligated to represent the Commonwealth and its officers in legal proceedings commenced against them. Plaintiff proposes that this Court override the statutory obligations of the Attorney General by requiring him to participate in litigation over which he has no control and by transferring his responsibility of defending the interests of Defendant Bridges and the Commonwealth to an attorney who is not subject to the direction or control of the Attorney General.

Defendant Bridges requests leave to submit a memorandum in support of this opposition on or before November 10, 1976.

Dated: November 1, 1976

FRANCIS X. BELLOTTI
ATTORNEY GENERAL


Andrew J. McElaney, Jr.
Assistant Attorney General


Denzil McKenzie
Assistant Attorney General

One Ashburton Place, Room 2019
Boston, Massachusetts 02108
Tel.: 727-1031

CERTIFICATE OF SERVICE

I, Andrew J. McElaney, Jr., certify that on November 1, 1976, I caused copies of the within Opposition and the Request for Oral Argument to be mailed, postage prepaid, to the following:

Barry A. Margolin, Esquire
Native American Rights Fund
364 Boylston Street, 2nd Floor
Boston, Massachusetts 02166
Attorney for Plaintiff


James D. St. Clair, Esquire
Hale & Dorr
28 State Street
Boston, Massachusetts 02109
Attorney for Town of Mashpee,
Maurice A. Cooper and John D. Ferguson

Selma R. Rollins, Esquire
Rollins, Rollins & Fox
1300 Boylston Street
Brookline, Massachusetts 02167
Attorney for New Seabury Corp.,
New Seabury Conveyancing Corp., and
Fields Point Manufacturing Corp.

Thomas J. Urmy, Jr., Esquire
Warner & Stackpole
28 State Street
Boston, Massachusetts 02109
Attorney for First Pennsylvania
Mortgage Trust.

Sumner Babcock, Esquire
Bingham, Dana & Gould
100 Federal Street
Boston, Massachusetts 02110
Attorney for Leonard W. Peck and
Margaret Peck

Thomas Otis, Esquire
Vance, Sanders & Co.
1 Beacon Street
Boston, Massachusetts 02108
Attorney for Thomas Otis, William M.
Atwood, Russell Makepeace, and Maurice Makepeace.



Andrew J. McElaney, Jr.
Assistant Attorney General

IN CLERK'S OFFICE
NOV 1 12 43 PM '76
DISTRICT COURT
DISTRICT OF MASS.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * *
MASHPEE TRIBE,
Plaintiff
v.
TOWN OF MASHPEE, ET AL,
Defendants
* * * * *

CIVIL ACTION
NO. 76-3190-S

OPPOSITION TO MOTION

DOCKETED

The defendants, Trustees of Reservation, and The First National Bank of Boston et al, as Executor of the Estate of Frank F. Savage, oppose the plaintiff's motion for class certification.

By their attorneys,

Richard W. Renehan
Richard W. Renehan

Hill & Barlow
Hill & Barlow

225 Franklin Street
Boston, Massachusetts 02110
423-6200

(65)

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

IN CLERK'S OFFICE

OCT 29 1 41 PM '76

DISTRICT COURT
DISTRICT OF MASS.

MASHPEE TRIBE,)
Plaintiff)

vs.)

Civil Action No. 76-3190-S

TOWN OF MASHPEE, ET AL.)
Defendants)

APPEARANCE

DOCKETED

Kindly enter my appearance in the above
action as Attorney for the Defendant, Town of Mashpee.

Morris Kirsner

MORRIS KIRSNER
89 State Street
Boston, Mass. 02109
523-3316

RICHARD BANCROFT
WILLIAM B. SLEIGH, JR.
HOWARD S. WHITESIDE
ALLAN R. ROSENBERG
JOHN G. VAN DUSEN
JOHN G. SERINO
ALEXANDER WHITESIDE, II
JOSHUA J. VERNAGLIA, JR.

Putnam, Bell & Russell

Attorneys at Law
53 State Street
Boston, Massachusetts 02109
(617) 723-3131
Cable: Puttenham
Of Counsel
RICHARD M. RUSSELL

IN CLERK'S OFFICE

OCT 28 6 09 PM '76

DISTRICT COURT
OCTOBER 26 1976
OF MASS.

George F. McGrath, Clerk
United States District Court
U.S. Post Office and Courthouse
Boston, Massachusetts 02109

DOCKETED

Re: Mashpee Tribe v. Manuel Beckwith, et al
Civil Action No. 76-3190-S

Dear Sir:

Please enter my appearance as representing
Manuel Beckwith in the above-entitled case.

Sincerely,

Allan R. Rosenberg
Allan R. Rosenberg

ARR:jds

cc: Barry Margolin, Esq.

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DEC 23 10 24 AM '76
DISTRICT COURT
OF MASS.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,	:	
	:	
PLAINTIFF	:	
	:	
v.	:	Civil Action No. 76-3190-S
	:	
NEW SEABURY CORP., <u>et al.</u> ,	:	
	:	
DEFENDANTS.	:	

ANSWER OF THE DEFENDANT
GREAT RIVER CORP.

1. The Defendant has insufficient knowledge or information to form a belief as to the truth of the averments in Paragraphs 1 through 5 of the Complaint.
2. Answering to Paragraph 6 of said Complaint, the Defendant admits to asserting an interest in certain lands in Mashpee, but denies the Plaintiff's right of possession of the same.
3. The Defendant has insufficient knowledge or information to form a belief as to the truth of the averments in Paragraphs 8 through 19 of the Complaint.
4. Answering to Paragraph 51 of the Complaint, the Defendant admits that it is the owner of record of numerous lots in Mashpee, but states that it has no knowledge as to whether the lot numbers set forth by the Plaintiff are correct.
5. Answering to Paragraph 112, the Defendant denies that the Plaintiff has any right of title or possession in and to any of the land standing in the name of the Defendant.

WHEREFORE, said Defendant prays that this Court:

1. Order that this Complaint be dismissed as against said

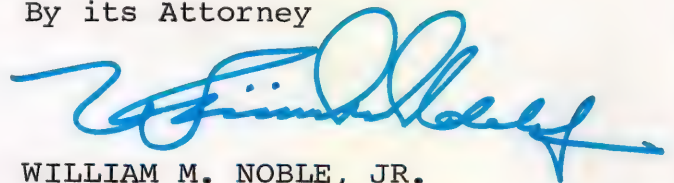
Defendant.

2. Order that the Plaintiff's claim to title and/or right of possession in the lands of the said Defendant, be denied.
3. Award the Defendant costs of this action, as the same may be applicable to it.
4. Award such other and further relief as to this Court shall be deemed meet and proper.

Dated: Newton, Massachusetts
October 20, 1976

GREAT RIVER CORP.

By its Attorney



WILLIAM M. NOBLE, JR.
1357 Washington Street
West Newton, Ma. 02165
(617) 244-8869

Commonwealth of Massachusetts
IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
MASSACHUSETTS

MASHPEE TRIBE,
PLAINTIFF

VS.

NEW SEABURY CORP., et al,
DEFENDANTS

ANSWER OF THE DEFENDANT

GREAT RIVER CORP.

FROM THE OFFICE OF

WILLIAM M. NOBLE, JR.
1357 WASHINGTON STREET
WEST NEWTON, MASS. 02165
617 - 244-8869

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

Civil Action File No. 76-3190

-S

* * * * *
MASHPEE TRIBE,
Plaintiff
v.
NEW SEABURY CORP., et als.,
Defendants
* * * * *

ANSWER OF THE DEFENDANT,
PEMBERTON WHITCOMB

1. The defendant admits that the plaintiff's action is a defendant class action. The defendant admits that all defendants are being sued individually and on behalf of all similarly situated persons pursuant to Rule 23 of the Federal Rules of Civil Procedure. The defendant denies the remainder of plaintiff's allegations contained in Paragraph 1 of its complaint.

2. The defendant admits all allegations of Paragraph 2 of plaintiff's complaint.

3. The defendant denies all allegations of Paragraph 3 of plaintiff's complaint.

4. The defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in Paragraph 4 of plaintiff's complaint.

5. The defendant denies all allegations of Paragraph 5 of plaintiff's complaint.

6. The defendant admits that that part of Paragraph 6 of plaintiff's complaint which alleges that the defendant asserts an interest in certain lands in Mashpee and Sandwich. The defendant denies the remaining allegations of Paragraph 6 of plaintiff's complaint.

7. The defendant denies all allegations of Paragraph 7 of plaintiff's complaint.

8. The defendant denies the allegation of Paragraph 8 of plaintiff's complaint that all relevant questions of law and fact are common to the said class of defendants and that the defenses of named representative parties are typical of the

defenses of the said class of defendants. The defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the remaining allegations contained in Paragraph 8 of plaintiff's complaint.

9. The defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in Paragraphs 9 and 10 of plaintiff's complaint.

10. The defendant admits that 25 U.S.C. 177 does provide in part the wording as alleged by the plaintiff in Paragraph 11 of its complaint. The defendant admits that the act is referred to as the "non-intercourse act". The defendant denies the remaining allegations of Paragraph 11 of plaintiff's complaint.

11. The defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained within Paragraphs 12, 13, 14, 15, 16, 17, 18, 19 and Paragraphs 20 through 112 of plaintiff's complaint, inclusive, excluding therefrom only Paragraphs 81, 88 and 107, the allegations of which the defendant admits.

12. And further ^{and} answering, the defendant states that there has never been ^{and} there is not now a group of people which has been known as the Mashpee Tribe, Mashpee Wampanoag, Marshpee, Massippee, Mashpa, Mashpea, and South Sea tribe or Indians.

13. If there ever was a tribe known by any of the names above recited, it has long since ceased to exist, its last surviving member has been dead for many years, and none of those who claim membership in the plaintiff tribe are ancestrally related to now-deceased members of the tribe. As such, the plaintiff and its members have no standing to claim the protection of 25 U.S.C. 177.

14. The said statute under which the plaintiff claims relief is unconstitutional on its face and is unconstitutional as applied to the facts of the case at bar.

15. The plaintiff and its members are guilty of laches and are thereby barred from recovery.

16. If there ever was title in the plaintiff or its members, they have been divested of that title by adverse possession in the defendants and the plaintiff and its members are thereby barred from recovery.

17. The plaintiff and its members have no standing of their own right to claim the protection of 25 U.S.C. 177.

18. The plaintiff and its members have failed to join an indispensable party as party plaintiff namely, the United States of America.

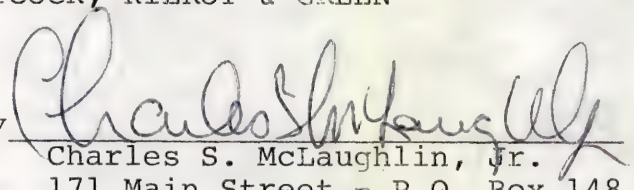
19. The plaintiff and its members have failed to state the claim upon which relief can be granted.

20. The plaintiff and its members or their ancestors have been paid in full for property now owned by the defendant and the plaintiff is thereby estopped to assert title or other interest in the land against the defendant.

21. The defendant's chain of title to the property which is, in part, the subject of this action stems directly from original members of the Mashpee tribe or direct decedents therefrom. The property was conveyed without restriction and the defendant holds good title to said property under the laws and constitutions of the Commonwealth of Massachusetts and the United States of America.

Defendant, PEMBERTON WHITCOMB
By his attorneys
MYCOCK, KILROY & GREEN

By


Charles S. McLaughlin, Jr.
171 Main Street - P.O. Box 148
Hyannis, MA 02601
(617) 771-5070

OCTOBER 22, 1976

UNITED STATES DISTRICT COURT

FOR THE

IN CLERK'S OFFICE DISTRICT OF MASSACHUSETTS

OCT 26 10 21 AM '76

Civil Action File No. 76-3190

-S

* * * * *
MASHPEE TRIBE, MASS.
Plaintiff

DOCKETED

v.
NEW SEABURY CORP., et als.,
Defendants
* * * * *

ANSWER OF THE DEFENDANT,
GEORGE E. PRIESTON

1. The defendant admits that the plaintiff's action is a defendant class action. The defendant admits that all defendants are being sued individually and on behalf of all similarly situated persons pursuant to Rule 23 of the Federal Rules of Civil Procedure. The defendant denies the remainder of plaintiff's allegations contained in Paragraph 1 of its complaint.

2. The defendant admits all allegations of Paragraph 2 of plaintiff's complaint.

3. The defendant denies all allegations of Paragraph 3 of plaintiff's complaint.

4. The defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in Paragraph 4 of plaintiff's complaint.

5. The defendant denies all allegations of Paragraph 5 of plaintiff's complaint.

6. The defendant admits that that part of Paragraph 6 of plaintiff's complaint which alleges that the defendant asserts an interest in certain lands in Mashpee and Sandwich. The defendant denies the remaining allegations of Paragraph 6 of plaintiff's complaint.

7. The defendant denies all allegations of Paragraph 7 of plaintiff's complaint.

8. The defendant denies the allegation of Paragraph 8 of plaintiff's complaint that all relevant questions of law and fact are common to the said class of defendants and that the defenses of named representative parties are typical of the

MYCOCK, KILROY
& GREEN
ATTORNEYS AT LAW
171 MAIN STREET
HYANNIS, MASS. 02601

TEL. (617) 771-5070

20

defenses of the said class of defendants. The defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the remaining allegations contained in Paragraph 8 of plaintiff's complaint.

9. The defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in Paragraphs 9 and 10 of plaintiff's complaint.

10. The defendant admits that 25 U.S.C. 177 does provide in part the wording as alleged by the plaintiff in Paragraph 11 of its complaint. The defendant admits that the act is referred to as the "non-intercourse act". The defendant denies the remaining allegations of Paragraph 11 of plaintiff's complaint.

11. The defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained within Paragraphs 12, 13, 14, 15, 16, 17, 18, 19 and Paragraphs 20 through 112 of plaintiff's complaint, inclusive, excluding therefrom only Paragraphs 81, 88 and 107, the allegations of which the defendant admits.

12. And further answering, the defendant states that there has never been ^{and} there is not now a group of people which has been known as the Mashpee Tribe, Mashpee Wampanoag, Marshpee, Massippee, Mashpa, Mashpea, and South Sea tribe or Indians.

13. If there ever was a tribe known by any of the names above recited, it has long since ceased to exist, its last surviving member has been dead for many years, and none of those who claim membership in the plaintiff tribe are ancestorily related to now-deceased members of the tribe. As such, the plaintiff and its members have no standing to claim the protection of 25 U.S.C. 177.

14. The said statute under which the plaintiff claims relief is unconstitutional on its face and is unconstitutional as applied to the facts of the case at bar.

15. The plaintiff and its members are guilty of laches and are thereby barred from recovery.

16. If there ever was title in the plaintiff or its members, they have been divested of that title by adverse possession in the defendants and the plaintiff and its members are thereby barred from recovery.

17. The plaintiff and its members have no standing of their own right to claim the protection of 25 U.S.C. 177.

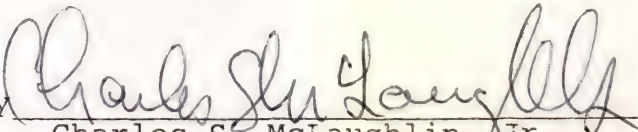
18. The plaintiff and its members have failed to join an indispensable party as party plaintiff namely, the United States of America.

19. The plaintiff and its members have failed to state the claim upon which relief can be granted.

20. The plaintiff and its members or their ancestors have been paid in full for property now owned by the defendant and the plaintiff is thereby estopped to assert title or other interest in the land against the defendant.

21. The defendant's chain of title to the property which is, in part, the subject of this action stems directly from original members of the Mashpee tribe or direct decedents therefrom. The property was conveyed without restriction and the defendant holds good title to said property under the laws and constitutions of the Commonwealth of Massachusetts and the United States of America.

Defendant, GEORGE E. PRIESTON
By his attorneys,
MYCOCK, KILROY & GREEN

By 
Charles S. McLaughlin, Jr.
171 Main Street - P.O. Box 148
Hyannis, MA 02601
(617) 771-5070

OCTOBER 22, 1976

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action File No.
76-3190-S

* * * * *
MASHPEE TRIBE,
Plaintiff

v.

NEW SEABURY CORP., ET ALS.,
Defendants
* * * * *

DOCKETED

APPEARANCE ON BEHALF OF
THE DEFENDANT, GEORGE E.
PRIESTON

Please enter our Appearance on behalf of the defendant
George E. Prieston, with respect to the above-entitled action.

Defendant,
By his attorneys,
MYCOCK, KILROY & GREEN

By Charles S. McLaughlin, Jr.
Charles S. McLaughlin, Jr.
171 Main Street-P.O. Box 148
Hyannis, MA 02601
(617) 771-5070

OCTOBER 22, 1976

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

Civil Action File No. 76-3190

-S

* * * * *
MASHPEE TRIBE,
Plaintiff

v.

NEW SEABURY CORP., et als.,
Defendants
* * * * *

ANSWER OF THE DEFENDANT,
SEA-LAKE CORPORATION

1. The defendant admits that the plaintiff's action is a defendant class action. The defendant admits that all defendants are being sued individually and on behalf of all similarly situated persons pursuant to Rule 23 of the Federal Rules of Civil Procedure. The defendant denies the remainder of plaintiff's allegations contained in Paragraph 1 of its complaint.

2. The defendant admits all allegations of Paragraph 2 of plaintiff's complaint.

3. The defendant denies all allegations of Paragraph 3 of plaintiff's complaint.

4. The defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in Paragraph 4 of plaintiff's complaint.

5. The defendant denies all allegations of Paragraph 5 of plaintiff's complaint.

6. The defendant admits that that part of Paragraph 6 of plaintiff's complaint which alleges that the defendant asserts an interest in certain lands in Mashpee and Sandwich. The defendant denies the remaining allegations of Paragraph 6 of plaintiff's complaint.

7. The defendant denies all allegations of Paragraph 7 of plaintiff's complaint.

8. The defendant denies the allegation of Paragraph 8 of plaintiff's complaint that all relevant questions of law and fact are common to the said class of defendants and that the defenses of named representative parties are typical of the

defenses of the said class of defendants. The defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the remaining allegations contained in Paragraph 8 of plaintiff's complaint.

9. The defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in Paragraphs 9 and 10 of plaintiff's complaint.

10. The defendant admits that 25 U.S.C. 177 does provide in part the wording as alleged by the plaintiff in Paragraph 11 of its complaint. The defendant admits that the act is referred to as the "non-intercourse act". The defendant denies the remaining allegations of Paragraph 11 of plaintiff's complaint.

11. The defendant is without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained within Paragraphs 12, 13, 14, 15, 16, 17, 18, 19 and Paragraphs 20 through 112 of plaintiff's complaint, inclusive, excluding therefrom only Paragraphs 81, 88 and 107, the allegations of which the defendant admits.

12. And further answering, the defendant states that there has never been ^{and} there is not now a group of people which has been known as the Mashpee Tribe, Mashpee Wampanoag, Marshpee, Massippee, Mashpa, Mashpea, and South Sea tribe or Indians.

13. If there ever was a tribe known by any of the names above recited, it has long since ceased to exist, its last surviving member has been dead for many years, and none of those who claim membership in the plaintiff tribe are ancestorily related to now-deceased members of the tribe. As such, the plaintiff and its members have no standing to claim the protection of 25 U.S.C. 177.

14. The said statute under which the plaintiff claims relief is unconstitutional on its face and is unconstitutional as applied to the facts of the case at bar.

15. The plaintiff and its members are guilty of laches and are thereby barred from recovery.

16. If there ever was title in the plaintiff or its members, they have been divested of that title by adverse possession in the defendants and the plaintiff and its members are thereby barred from recovery.

17. The plaintiff and its members have no standing of their own right to claim the protection of 25 U.S.C. 177.

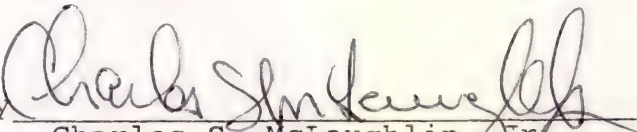
18. The plaintiff and its members have failed to join an indispensable party as party plaintiff namely, the United States of America.

19. The plaintiff and its members have failed to state the claim upon which relief can be granted.

20. The plaintiff and its members or their ancestors have been paid in full for property now owned by the defendant and the plaintiff is thereby estopped to assert title or other interest in the land against the defendant.

21. The defendant's chain of title to the property which is, in part, the subject of this action stems directly from original members of the Mashpee tribe or direct decedents therefrom. The property was conveyed without restriction and the defendant holds good title to said property under the laws and constitutions of the Commonwealth of Massachusetts and the United States of America.

Defendant, SEA-LAKE CORPORATION
By its attorneys,
MYCOCK, KILROY & GREEN

By 
Charles S. McLaughlin, Jr.
171 Main Street - P.O. Box 148
Hyannis, MA 02601
(617) 771-5070

OCTOBER 22, 1976

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

DUCKETED

Civil Action File No. 76-3190-S

MASHPEE TRIBE,
Plaintiff

v.

NEW SEABURY CORP., ET ALS.,
Defendants

APPEARANCE ON BEHALF OF
THE DEFENDANT, SEA-LAKE
CORPORATION

Please enter our Appearance on behalf of the defendant,
Sea-Lake Corporation, with respect to the above-entitled
action.

Defendant,
By its attorneys,
MYCOCK, KILROY & GREEN

By

Charles S. McLaughlin, Jr.
Charles S. McLaughlin, Jr.
171 Main Street-P.O. Box 148
Hyannis, MA 02601
(617) 771-5070

OCTOBER 22, 1976

MYCOCK, KILROY
& GREEN
ATTORNEYS AT LAW
171 MAIN STREET
HYANNIS, MASS. 02601

TEL. (617) 771-5070

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IN CLERK'S OFFICE
OCT 25 10 27 AM '76
DISTRICT COURT
DISTRICT OF MASS.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

DOCKETED

MASHPEE TRIBE,	)	CIVIL ACTION #76-3190-S
)	
Plaintiff)	
)	
VS.	)	ANSWER OF THE
	)	DEFENDANT, HERBERT
	)	LEMELMAN, INDIVIDUALLY
NEW SEABURY CORP. ET AL	)	AND AS TRUSTEE OF
Defendants	)	CAPE LAND TRUST
)	

1. The Defendant, HERBERT LEMELMAN, individually and as Trustee of CAPE LAND TRUST, respectfully states that the allegations contained in Paragraphs 1, 2, 3 and 4 are not susceptible to an affirmative pleading, and, therefore, the said Defendant neither admits nor denies same.

2. The said Defendant is without knowledge as to whether or not the Plaintiff is, in fact, a Tribe within the meaning of any authority relied upon by the Plaintiff in its claim and calls upon the Plaintiff to specifically prove same at trial.

3. The said Defendant specifically denies that he is keeping the Plaintiff out of possession of any land which is the subject matter of this litigation, and further denies the validity of any interest that the Plaintiff claims in said land.

4. The said Defendant admits that he has been sued individually, and further answering, states that the allegation that he is being sued as a representative on behalf of all other persons who are not members of the Mashpee Tribe, and who assert any interest in any portion of the subject land, is a conclusion of law not susceptible to an affirmative pleading, and, therefore, the said Defendant neither admits nor denies same.

5. The said Defendant is without knowledge as to the allegations contained in Paragraphs 9 and 10 of the Complaint, and, therefore, neither admits nor denies same.

6. The said Defendant states that the allegations contained in Paragraph 11 of the Complaint are merely a recitation of alleged statutory authority, and as such, are conclusions of law not susceptible to an affirmative pleading, and, therefore, the said Defendant neither admits nor denies same.

7. The said Defendant denies the allegations contained in Paragraphs 12 through 19 of the Complaint.

8. The said Defendant is without knowledge as to the allegations contained in Paragraphs 20 through 61, and allegations contained in Paragraphs 63 through 111, of the Complaint, and, therefore, neither admits nor denies same.

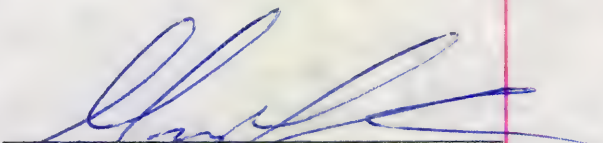
9. The said Defendant admits that he is the owner, as Trustee of CAPE LAND TRUST, of the parcel described in Paragraph 62 of the Complaint.

10. The Defendant, HERBERT LEMELMAN, as Trustee of CAPE LAND TRUST, further states that he is the valid owner of a fee simple interest in the real property in question, and that his ownership is superior to any claim raised by the Plaintiff herein.

11. The Defendant, HERBERT LEMELMAN, as Trustee of CAPE LAND TRUST, further states that this Complaint has not been brought within the time allowed by law, and therefore, should not be recognized by this Honorable Court.

12. And further answering, the Defendant, HERBERT LEMELMAN, as Trustee of CAPE LAND TRUST, states, on information and belief, that the Plaintiff has had opportunity for many years to raise the issues alleged in this Complaint, and that it has failed to do so. As a matter of substantial justice and equity, the Plaintiff's claims should be denied by this Honorable Court.

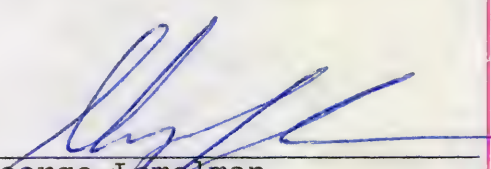
By his attorney,



George Lemelman
LEMELMAN & BAKER
11 Beacon Street
Boston, MA 02108
227-5400

CERTIFICATE OF SERVICE

I, GEORGE LEMELMAN, Attorney for the Defendant, HERBERT LEMELMAN, as Trustee of CAPE LAND TRUST, hereby certify that on October 21, 1976, I served a copy of the within ANSWER OF THE DEFENDANT, HERBERT LEMELMAN, INDIVIDUALLY AND AS TRUSTEE OF CAPE LAND TRUST by mailing a copy thereof, postage prepaid, to Barry A. Margolin, Esq., Native American Rights Fund, 364 Boylston Street, 2nd Floor, Boston, MA 02116, Attorney for the Plaintiff.



George Lemelman
LEMELMAN & BAKER
11 Beacon Street
Boston, MA 02108
227-5400

IN CLERK'S OFFICE

OCT 22 10 23 AM '76

U.S. DISTRICT COURT
DISTRICT OF MASS.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION 76-3190-S

WASHPEE TRIBE

Plaintiff

VS.

NEW SEABURY CORP., ET ALS

Defendants

)
)
) ANSWER OF DEFENDANTS, ROBERT R.
) McNUTT, JR., AND GRACE C. McNUTT
)
)

DOCKETED

The Defendants, Robert R. McNutt, Jr., and Grace C. McNutt, answer the Complaint of the Plaintiff as follows:

1. As to paragraphs numbered 1, 2, 4, 8, 13, 14 and 15, the Defendants are without sufficient knowledge, belief or information to admit or deny the allegations contained in said paragraphs and call upon the Plaintiff to prove same.

2. As to paragraph numbered 3, the Defendants deny that the Plaintiff's claim arises as set forth therein.

3. As to paragraph numbered 5, the Defendants deny that the Plaintiff is a "tribe" of Wampanoag Indians as so described and further deny that the Plaintiff conducts its business as so alleged nor that it has a duly constituted governing body.

4. As to paragraph numbered 6, the Defendants, on behalf of themselves, admit the allegations contained therein.

5. As to paragraph numbered 7, the Defendants deny that they are representatives as alleged therein.

6. As to paragraph numbered 9, the Defendants deny the allegations contained therein.

7. As to paragraph numbered 10, the Defendants deny the allegations contained therein.

8. As to paragraph numbered 11, the cited U.S.C. and other acts and statutes will speak for themselves.

9. As to paragraph numbered 12, the Defendants deny the allegations contained therein.

10. As to paragraph numbered 16, the cited "Indian Non-intercourse Act" will speak for itself.

11. As to paragraph numbered 17, the Defendants deny the allegations contained therein.

12. As to paragraph numbered 18, the Defendants deny the allegations contained therein.

13. Paragraph numbered 19 is not applicable.

14. As to paragraph numbered 68, the Defendants allege that they claim and own lands in addition that are set forth therein that are situated in the Town of Mashpee.

15. As to paragraphs numbered 20 thru 111, excluding paragraph numbered 68, the Defendants do not answer as they have no knowledge of same.

16. As to paragraph numbered 112, the Defendants claim and own certain lands in the Town of Mashpee and deny that they kept or are keeping the Plaintiff out of possession of same in violation of the cited code or any other codes, laws, statutes or acts.

FIRST DEFENSE

The Plaintiff is guilty of laches in that the within action was not timely brought.

SECOND DEFENSE

The Plaintiff has failed to bring the within action

within the time provided by law and can now not maintain this action.

THIRD DEFENSE

The Defendants state that they and their predecessors in interest have openly, notoriously, adversely, exclusively and continuously used and occupied the land in question against all claimants for a period of time in excess of that required by law necessary or required to establish and vest title in the said Defendants.

Wherefore the Defendants move that the within action be dismissed against them, judgment entered in their favor, together with costs and attorneys fees.

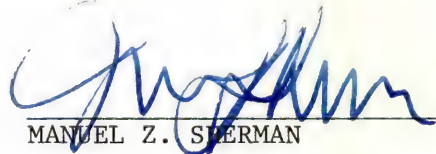
By their Attorney,



MANUEL Z. SHERMAN
73 Tremont Street
Boston, MA 02108
227-2581

CERTIFICATE OF SERVICE

I, Manuel Z. Sherman, attorney for the Defendants, Robert R. McNutt, Jr., and Grace C. McNutt, hereby certify that on this 21st day of October, 1976, I have served a copy of the foregoing Answer upon the Plaintiff by mailing the same, postage prepaid, to Barry A. Margolin, Esq., Native American Rights Fund, 364 Boylston Street, Boston, MA 02116.


MANUEL Z. SHERMAN

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,)
)
Plaintiff)
)
v.) C.A. NO. 76-3190-S
)
TOWN OF MASHPEE, ET AL)
)
Defendants)

MEMORANDUM OF TOWN OF MASHPEE, ET AL
IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

On August 23, 1976, the plaintiff, a group claiming to be the Mashpee Indian Tribe (hereinafter "plaintiff") filed this defendant class action alleging a violation of the Indian Nonintercourse Act, 25 U.S.C. §177 (1963), naming the Town of Mashpee and numerous private non-Indian title holders as representatives of the class (hereinafter "defendants"). The plaintiff demanded that it be restored to immediate possession of all lands except "any portion of the subject land which [constitutes] the actual site of the principal place of residence of any individual". As to those parcels occupied by the putative defendant class, the plaintiff prayed that those remaining in possession be required to pay to the plaintiff the fair rental value in perpetuity.

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The Court's jurisdiction has been invoked pursuant to 28 U.S.C. §§ 1331, 1337, with an amount in controversy claimed to exceed \$10,000.00, exclusive of interest and costs, with respect to each defendant. The plaintiff's claim for relief is said to arise under 25 U.S.C. §177, the so-called Indian Nonintercourse Act, passed by the first United States Congress in 1790.

The motion to dismiss filed herewith by the defendants Town of Mashpee, et al (the "Town") rests upon three separate and distinct grounds. The Town says that it is entitled to a judgment of dismissal in its favor under any of these three grounds. These grounds are the failure of the complaint to state a cause of action, F.R.C.P. 12(b)(6); failure to join the United States of America as an indispensable party plaintiff, F.R.C.P. 12(b)(7), and F.R.C.P. 19; and, failure to join the Commonwealth of Massachusetts as an indispensable party plaintiff, F.R.C.P. 12(b)(7) and F.R.C.P. 19.

II. ARGUMENT

- A. THIS COURT MAY NOT ADJUDICATE A CLAIM BY A GROUP OF INDIANS WHICH HAS NOT BEEN RECOGNIZED AS A "TRIBE" BY CONGRESS OR ITS DELEGATE BECAUSE TO DO SO WOULD REQUIRE INQUIRY INTO A NON-JUSTICIABLE MATTER.

The plaintiff's complaint should be dismissed in the first instance because it has not stated a claim upon which relief may be granted. Plaintiff has not stated a justiciable cause of action here because it has not pleaded that it is recognized as a tribe either by Congress or its delegate. Absent such recognition, plaintiff may not be heard by this Court for to do so

would involve the Court in adjudication of a political and, therefore, non-justiciable matter.

The plaintiff chose to sue as a "tribe" rather than as a group of individuals of asserted "Indian" ancestry. Having made this choice, the plaintiff is confronted with a two-tiered test:¹

1. It must first demonstrate that the group constitutes a sovereign "tribe" in the legal and political sense.
2. It must then produce competent evidence that the group presently is a "tribe" as that term is used in the Indian Non-intercourse Act. 25 U.S.C. §177 (1963).²

Only the first of these tests is placed in issue by this F.R.C.P. 12(b)(6) Motion to Dismiss. This requirement that only a recognized sovereign can sue in federal court is one that is firmly entrenched in international law, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409 (1964) (citing The Penza, 277 F. 91,

¹To demonstrate the distinction between the two tests, one can hypothesize a statute dealing with rights of a "foreign country" in United States courts. To bring suit, a recently created African nation would first need to establish that the United States has recognized it as independent sovereign. Assuming it clears this hurdle, it must still establish that the term "foreign country" as it is used in that statute, was intended to cover African nations.

²The Nonintercourse Act as now codified provides in pertinent part that:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. §177 (1963).

92-94 (1921)), the source of the principle embodied in the Non-intercourse Act. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). See generally, Note, Indian Title: The Rights of American Natives in Lands They have Occupied Since Time Immemorial, 1975 Col. L. Rev. 655, 657-59. In this particular case, it is a requirement that results from the semi-independent sovereign nature of Indian tribes:

All these acts [dealing with Indian tribes]
. . . manifestly consider the several Indian
nations as distinct political communities,
having territorial boundries, within which
their authority is exclusive . . .

Worcester v. Georgia, 31 U.S. (6 Pet.) 556-57 (1832).³ Absent the unequivocal recognition of the plaintiff as such a legally and politically distinct entity, this Court is unable to adjudicate the claim which the plaintiff has placed before it.

1. Only Congress Or Its Delegate Has The Power To Designate A Group Of Indians As A Recognized "Tribe".

The question of whether a tribe exists, in the legal or political, as opposed to the anthropological sense, is one which is reserved exclusively to the Congressional branch of the federal government. U.S. Dept. of Interior, Federal Indian Law, 455 (1958). A court is, therefore, powerless to designate any group, not otherwise recognized by Congress, as a tribe for to do so would

³The sovereign character of Indian tribes is best evidenced by Article I, Section 8, Clauses 1 and 3, of the Constitution which group foreign nations, the States and Indian Tribes. ("The Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.")

be to determine a "matter . . . considered unsuited to judicial inquiry or adjustment". Baker v. Carr, 269 U.S. 186, 196 (1962). As stated in United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866):

[I]t is the rule of this court to follow the action of the Executive and other Political Departments of the Government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

70 U.S. (3 Wall.)at 419.

The principle was reaffirmed in United States v. Sandoval, 231 U.S. 28, 46 (1913). In that case, the Court held that Congress intended certain liquor restrictions to apply to the Pueblos; in doing so, it determined that the Pueblos were a group which Congress, by its consistent and uniform course of conduct, had recognized as an Indian tribe entitled to its protection. This determination as to legal status was reserved to the legislative branch:

[I]n respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.

231 U.S. at 46.

In the leading case of Baker v. Carr, 369 U.S. 186, 215 (1962), the Court carefully distinguished the justiciable question of apportionment from the political question of the "status of Indian tribes". The Court stated that its deference to the "political departments" in the matter of determining whether

certain Indians are recognized as a tribe is appropriate, both because the matter "reflects familiar attributes of political questions", citing Holliday, supra, and because there exists a unique element in the relation of the Indians to the United States marked by "peculiar and cardinal distinctions" which exist nowhere else. 369 U.S. at 215, citing The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16, 17 (1831). See, Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

The only alternative status cognizable in federal court for a group of Indians, not otherwise federally recognized, is that of "treaty tribe". Significantly, designation as a treaty tribe has also been held to be a political question.

The recognition of a tribe as a treaty party or as the political successor in interest to a treaty party is a federal political question on which . . . federal courts must follow the determination by the legislative or executive branch of the Federal Government.

United States v. Washington, 384 F. Supp. 312, 400 (W.D. Wash. 1974), aff'd. 520 F. 2d 676 (6th Cir. 1975) cert. denied, 423 U.S. 1086 (1976).

The power to designate "tribes" is not without some judicial limitation; the Supreme Court has described judicial intervention as proper where it prevents "heedless extension" of the description "tribe". Baker v. Carr, 369 U.S. 186, 215-217 (1962). Thus, if Congress attempted to bring a community of people within its powers by arbitrarily labelling them an Indian "tribe", a federal court could review and strike this determination. Ibid., citing in part, U.S. v. Sandoval, 231 U.S. 28, 46 (1913).

In no case, however, has a court attempted to grant federal recognition as a "tribe" when neither Congress nor its delegate has previously done so for such an act would be the adjudication of a political question. See, Sioux Indians v. United States, 277 U.S. 424, 437 (1928); Haile v. Saunooke, 246 F. 2d 293 (4th Cir. 1957).

Although the opinion in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (N.D. Me. 1975), would appear to be in conflict with the rule of nonjusticiability discussed above, that court was confronted only with the narrow question of whether a group of Indians, stipulated by the parties to be a "tribe", 388 F. Supp. at 660 n. 12, was a "tribe" as that term is used in the Nonintercourse Act. The court continually noted that it was dealing only with a question of interpreting legislative intent, 388 F. Supp. at 655, 664, and carefully distinguished the justiciable question of statutory construction before it from the nonjusticiable status issue raised in United States v. Sandoval, 231 U.S. 28 (1913). 388 F. Supp. at 659. ("The issue presented to the Supreme Court [in Sandoval] was not one of statutory construction. . . .") Having defined the issue in this limited fashion, the court provided itself with a controversy it was capable of adjudicating. It then went on to hold that federal recognition was not a sine qua non for treatment as a "tribe" within the Nonintercourse Act.

The District Court in Passamaquoddy reached its holding only by failing to join and resolve the threshold issue of whether the Passamaquoddy Indians were a tribe as defined and recognized by Congress or its delegate, and, therefore, entitled to sue

lack of respect due the Congressional and Executive branches condemned in Baker v. Carr, 369 U.S. 186, 217 (1962).

To the extent that the broad language employed by the Passamaquoddy court appears to dispense with the condition precedent of recognized status, it is in direct conflict with the purpose underlying remedial statutes such as the Nonintercourse Act. As discussed above, the special treatment accorded Indian nations and tribes was predicated on their existence as semi-sovereign albeit existing physically within a greater sovereign, the United States. Worcester v. Georgia, 31 U.S. (6 Pet.) 556-57. United States v. Joseph, 94 U.S. 614,617 (1876) ("The tribes for whom the [Nonintercourse] Act was made, were those semi-independent tribes, whom our government has always recognized as exempt from our laws . . .") As sovereigns, these Indian nations are entitled to the same treatment accorded foreign nations by the federal courts; and standard international law would preclude suit by any sovereign without proper recognition by Congress or its delegate. See text, supra, at 3. Any departure from this requirement would constitute an unwarranted deviation from the rationale and principles underlying the Nonintercourse Act. Moreover, the efforts by the Passamaquoddy district court to limit those cases, such as U.S. v. Sandoval, 231 U.S. 28, 46 (1913), which explicitly commit determination of tribal status to the political branches of the government, denies the breadth and force of the language used in those decisions.

The seminal case in the development of the political question doctrine described the issue of determination of tribal

status to be one of the foremost examples of a nonjusticiable issue. *Baker v. Carr*, 369 U.S. 186, 215 (1962). The inquiry made by the district court in Passamaquoddy into the cultural, racial and anthropological existence of a "tribe"; into the sophistication of the Indians; into the tribe's degree of civilization, and the extent of its community; involved resolving precisely the types of questions reserved to the political departments. 369 U.S. at 217. Such an inquiry requires a judicial foray into an area without any "judicially discoverable and manageable standards" available. Id. A decision of recognition or non-recognition of tribal status by Congress or its delegate is not intended to be merely instructive; rather, it stems from a basis Congressional policy determination of a kind clearly for nonjudicial discretion, since the whole power of regulating intercourse with Indian nations has been expressly reserved by Article I, Section 8 of the Constitution to the Congress. Any attempt to limit the operation of this Constitutional provision by imposing unjustifiable limitations on the cases interpreting this Congressional power would be improper.

The Court of Appeals in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), ruled only on those issues framed and argued in the district court based upon facts determined in that court. The only question directly relevant to the issue of recognition on which the Circuit Court rules was "(1) whether the Nonintercourse Act applies to the Passamaquoddy tribe . . ." 528 F.2d at 373. The Circuit Court did not treat with the issue of tribal recognition as a legal entity since it simply adopted the analysis and factual determinations made by the district court. The Circuit

Court relied on the stipulations of the parties below as to tribal existence in the "racial and cultural sense", 528 F.2d at 377 n. 7, noted that because of the stipulation "there is no question that the tribe is a 'distinctly Indian' community", and stated that "[n]o one in this proceeding had challenged the tribe's identity as a tribe . . ." 528 F.2d at 378. These adopted factual determinations were integral to the Circuit Court's acceptance of the district court's legal conclusions. Upon a reading of the present complaint most favorable to the plaintiff, no such factual conclusions may be drawn as to the plaintiff's tribal existence.

2. The Plaintiff Has Failed To Allege Congressional Recognition And Its Action, Therefore, Must Be Dismissed For Failure To State A Claim For Which Relief Can Be Granted.

The standard to be applied when ruling on a Fed. R. Civ. P. 12(b)(6) motion has been stated as follows:

The question . . . is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf the complaint states any valid claim for relief . . . [T]he pleader must [however] set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist.

Wright and Miller, Federal Practice and Procedure: Civil §1357.

Taking all facts as pleaded by the plaintiff to be true, there is absolutely no claim of federal recognition in the Complaint.⁵

⁵The Department of Interior in promulgating regulations under another statute has indicated the types of recognition possible:

"Recognized tribe" means any Indian tribe which has entered into a treaty, convention or executive agreement with the Federal Government or whose tribal entity has been otherwise recognized by the United States.

Absent such an allegation, this Court is powerless to designate the plaintiff a "tribe"; for to do so would be to rule on a nonjusticiable controversy. Hence, even under the liberal pleading rules of Fed. R. Civ. P. 8(a),⁶ this Court should enter judgment on the merits for the defendants on the ground that the plaintiff has failed to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6). Bell v. Hood, 327 U.S. 678, 682 (1946).

It is, of course, within the power of this Court to give the plaintiff leave to file an amended complaint. See e.g., Ballou v. General Electric Co., 393 F.2d 398 (1st Cir. 1968). See generally, Wright and Miller, Federal Practice and Procedure: Civil §1357. When it appears, however, that, to a certainty, a plaintiff cannot state a claim, amendment should be refused. See e.g., Christophides v. Porco, 289 F. Supp. 403 (S.D.N.Y. 1968). Defendants submit that this is just such a case.

An exhaustive and conclusive catalog of those tribes federally recognized has been published by the Bureau of Indian Affairs, U.S. Dept. of Interior, Bureau of Indian Affairs, American Indians and Their Federal Relationship (1972) ("BIA list"). See Appendix A. As such, it is subject to judicial

⁶Fed. R. Civ. P. 8(a) provides in pertinent part:

Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief.

under any statute in federal court. Had defendants raised this issue at the outset and the Court reached a determination that the Indians were not a tribe, the Court would not have been required to decide whether federal recognition was necessary to come within the Nonintercourse Act. Had the issues been in fact framed in light of the prevailing law, the court would have been compelled to hold that only those tribes federally recognized are entitled to sue under 25 U.S.C. §177; the issue of statutory construction actually addressed by the Passamaquoddy district court arises only if the Indian plaintiffs could demonstrate this special status.⁴

It appears the Passamaquoddy court treated the issue of recognized tribal status as rendered moot by the parties stipulation that the Passamaquoddies did, in fact, constitute a "tribe". 388 F. Supp. at 651, 600 n. 12. But the question of recognized tribal status has been demonstrated by U.S. v. Holliday, 70 U.S. (3 Wall.) 407 (1865), and its progeny to be a political question which is reserved to branches of the government other than the judiciary. Neither the courts nor the parties by their stipulation can withdraw from a coordinate branch of the government a question reserved exclusively for its judgment. What the political question doctrine forbids the courts to do directly cannot be accomplished indirectly by stipulation; for to do so would be to express that

⁴Presumably, the Nonintercourse Act covers only some subset of all federally recognized tribes. If a recognized tribe were to sue, the question of whether it was within that subset would be justiciable.

notice under Fed. R. Evid. 201 as an adjudicative fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See generally, McCormick on Evidence §330 (2d ed. 1972). The BIA list is equivalent to a compilation of the Department of the Interior's orders of recognition and, therefore, can and should be judicially noticed.

The BIA list, which places the plaintiff in category 7, American Indians and Their Federal Relationship 17, indicates that the Mashpee group has never received Bureau of Indian Affairs services. That this is equivalent to lack of federal recognition is demonstrated in United States v. State of Washington, 384 F. Supp. 312 (W.D. Wash. 1974) aff'd. 520 F.2d 676 (6th Cir. 1975) cert. denied, 423 U.S. 1086 (1976). In that case, the Stillaguamish Indians, who had remained in the aboriginal area they originally inhabited and who continued to follow a tribal constitution, claimed status as a federally recognized tribe. The court held that although the group may have constituted a tribe in the cultural and anthropological sense, they had not been granted formal recognition. The significance of this holding is evidenced by the fact that the court relied upon the Bureau of Indian Affairs category 5 characterization of the Stillaguamish---recognition of the group for the limited purposes of settlement claims against the United States. 384 F. Supp. at 379. If this group of Indians with some limited contact with the United States has failed to establish federal recognition, the plaintiff, which is not even recognized for the same limited purposes as the

Stillaguamish, must be held to be not recognized.⁷ Thus, the plaintiff's failure to allege federal recognition, and this Court's ability to conclusively determine that the plaintiff would not be capable of amending to cure this defect, require dismissal for failure to state a claim for which relief can be granted.

B. THE UNITED STATES IS AN INDISPENSABLE THIRD PARTY
WHOSE ABSENCE NECESSITATES DISMISSAL.

The defendants have also moved to dismiss for failure to join an indispensable party plaintiff, the United States of America, pursuant to F.R.C.P. 12(b)(7) and 19. This motion raises three issues:

1. Whether under Rule 19(a) the United States is a party which should be joined?
2. Whether under Rule 19(a) it is possible for the court to order joinder?
3. Whether under Rule 19(b) the court should determine that the United States is in fact an indispensable party whose absence requires dismissal if compulsory joinder is not possible?

See generally, Wright and Miller, Federal Practice and Procedure:

⁷The Bureau of Indian Affairs numerical categorization of groups of Indians assigns a lower number to those groups with the greatest quantum of federal contacts.

Civil §§1601-611.

1. The Failure To Join The United States In This Litigation Would Subject The Defendants To A Substantial Risk Of Multiple Suits On The Same Claim.

It is well settled that a judgment for the defendants in this suit brought by the plaintiff would not bar a subsequent action on the same claim by the United States in its capacity as trustee:

[T]he United States will not be bound by any determination made in a suit to which it is not a party . . .

Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 371 (1968)(suit by federally recognized Indians for breach of lease); Fort Mojave Tribe v. Lafollette, 478 F.2d 1016, 1018 (9th Cir. 1973) (suit by federally recognized tribe to quiet land title); Choctaw and Chickasaw Nations v. Seitz, 193 F.2d 456 (10th Cir. 1951) cert. denied, 345 U.S. 919 (1952)(suit by federally recognized Indians to quiet title). The consequence of a failure to join the United States would, therefore, fall squarely within subdivisions (1) and (2)(ii) of Rule 19, which require joinder of a party if

- (1) in his absence complete relief cannot be accorded among those already parties, or
- (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Those provisions of the Rule are intended to protect both the

the defendants' and the public's interest in avoiding multiple litigation:

[T]he public must [also] bear the burden of double expenses for two suits
[T]he public interest clearly militates against repeated law suits on the same subject matter.

Prestenback v. Employers' Insurance Company, 47 F.R.D. 163, 167 (E.D. La. 1969). This interest of the public is especially significant in the instant case since the defendant Town of Mashpee, and through it, its citizens, must bear the expense of defending this suit. For effect to be given to the interest of the courts and the public in complete, consistent and efficient settlement of controversies, Provident Tradesman Bank and Trust Co. v. Patterson, 390 U.S. 102, 111 (1968), joinder of the United States should be ordered, if possible.⁸ See generally, Wright and Miller, Federal Practice and Procedure: Civil §1604.

2. Having Waived Its Sovereign Immunity In Actions To Quiet Title, The United States Can Be Compelled To Join As A Party Defendant.

In the first instance, Rule 19(a) would direct the Court to order joinder of the United States as a party plaintiff. Should the United States decline to join as a party plaintiff, the Rule requires that it be made a defendant unless such joinder "will . . . deprive the court of jurisdiction over the subject matter of

⁸ Joinder of the United States would also benefit the plaintiff since it would allow the United States Government to satisfy the fiduciary obligation owed to the plaintiff. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

the action . . ." Rule 19(a). The doctrine of sovereign immunity usually precludes joinder of the United States as a defendant; however "[i]f the United States has expressly consented to be sued, or its consent can be implied, the joinder is feasible".

Wright and Miller, Federal Practice and Procedure: Civil §1617.

In the instant case, the United States has, by statute, provided the necessary consent:

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

28 U.S.C. §2409a(a) (1976) (effective October 25, 1972).

The defendants, in urging Rule 19 joinder, seek to quiet title to their properties. The United States, on the other hand, could claim an interest in the property by virtue of the fiduciary duty it owes to Indian tribes. Moreover, the United States allegedly is possessed of the right to extinguish aboriginal title, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 146 (1810), another interest contrary to that the defendants seek to vindicate. If similar competing interests existed between private parties, a state action to quiet title would be appropriate. This subsection is intended to eliminate a contrary result simply because one of the parties happens to be the United States. 1972 U.S. Code Cong. and Adm. News 4547, 4554.

The exception embodied in the statute for "restricted

Indian lands" is not applicable here for it was intended to cover only those instances in which the United States holds fee title on behalf of Indians. Carlson v. Tulalip Tribes of Washington, 510 F.2d 1337, 1339 (9th Cir. 1975) (dispute over unallotted reservation land in which the United States held fee title). The purpose of exempting such lands was to prevent abridgement of Indian property rights without Indian consent. 1972 U.S. Code Cong. and Adm. News 4547, 4557. This could only happen when someone other than the Indians nominally holds the entire fee. Where aboriginal title is involved, no Indian interest can be divested in a suit against the United States.

It has also been held that the "restricted Indian land" exemption does not apply when the question being litigated is whether there is in fact restricted Indian land. United States v. Phillips, 362 F. Supp. 462 (1973 D. Neb.). In that case, the United States sued in its capacity as trustee to quiet title to certain putative Indian lands. The defendants counterclaimed praying that their title be confirmed. The United States moved to dismiss, asserting its sovereign immunity. The court rejected this defense by holding that 28 U.S.C. §2409a operated as consent to suit. It then went on to state the reason the exception embodied in §2409a was inapposite in suits asserting Indian title:

[T]his Court will necessarily have to determine whether the land in question was . . . restricted Indian lands because this issue is contained in the main claim asserted by the United States. If this issue is determined adversely to the United States then the waiver of sovereign immunity is effective, and the exception would be inapplicable to this action.

362 F. Supp. at 463. There consequently are no limitations on the §2409a waiver of immunity in the instant case. The fact that the vehicle for the defendants' attempt to quiet title is Rule 19 compulsory joinder rather than by counterclaim or plaintiff's complaint is irrelevant. Any such distinction would be contrary to the basic tenor of the federal rules. 362 F. Supp. at 463.

3. Should The United States Not Be
Joined As A Party Defendant, This Court
Should Determine That The Government Is
An Indispensable Party Whose Absence
Requires Dismissal.

Should the Court, for any reason, not be able to order joinder of the United States as a party defendant, Rule 19(b) directs the court to determine whether the party is so indispensable that its absence requires dismissal. In making this determination, the rule provides that the following factors should be considered:

1. The extent to which a judgment rendered in the person's absence might be prejudicial to him or those already parties.
2. The extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided.
3. Whether a judgment rendered in the person's absence will be adequate.
4. Whether the plaintiff will have an adequate remedy if the action is dis-

missed for nonjoinder.

Rule 19(b). See generally, Wright and Miller, Federal Practice and Procedure: Civil §1608.

The general rule in suits involving Indian lands has been stated to be that "because of its legal or other governmental interest [the United States] is normally an indispensable party to actions involving Indian lands"; its absence, therefore, would require a dismissal of the action under Rule 19(b).

3A Moore's Federal Practice §19.15. The courts, however, have effected an artificial distinction between suits by Indians and suits against Indians. In the former, the United States has been held not to be an indispensable party and the courts have proceeded with the parties before it. In the latter, it has been held to be an indispensable party whose absence necessitates dismissal.

For example, in Choctaw and Chickasaw Nations v. Seitz, supra, a suit by Indians to recover possession and establish title, the court found the United States not to be indispensable:

So it comes down to this: If we hold that the United States is an indispensable party, the [Indians] will be unable to assert their long-standing claim to the land; and if we hold that the United States is not an indispensable party, the defendants will run the risk of the burden and expense of defending two lawsuits, even though they succeed in obtaining a judgment if their favor in the instant action.

We are of the opinion that the equities presented by the situation and the inconveniences that will result . . . weigh heavily in favor of the [Indians].

193 F.2d at 461 (emphasis added).¹⁰

Conversely, in Carlson v. Tulalip Tribes of Washington, 510 F.2d 1337 (9th Cir. 1975), a suit against Indians by a non-Indian plaintiff, the Indians moved to join the United States. When the United States refused to be joined as a party defendant, the court held:

[T]he United States is a necessary party to any action in which the relief sought might interfere with its obligation to protect Indian lands against alienation . . . Because the United States has refused to be joined as a party, the litigation could not properly proceed.

510 F.2d at 1339.¹¹

The courts have offered two justifications for the distinction, both of which have been rendered inapposite by the First Circuit decision in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) ("Passamaquoddy").

First, those courts have held that in a suit against the Indians, judgment for the plaintiff, divesting the Indians of title, "would impair [the United States'] governmental function to protect

¹⁰ Similar results were reached in other suits by Indians. Bird Bear v. McClean Co., 513 F.2d 190, 191 n. 6 (8th Cir. 1975); Cheyenne River Sioux Tribe v. United States, 338 F.2d 906 (8th Cir. 1964) cert. denied, 382 U.S. 815 (1965); Skokomish Indian Tribe v. France, 269 F.2d 555 (9th Cir. 1959); Jackson v. Sims, 201 F.2d 259 (10th Cir. 1953); Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Company, 353 F. Supp. 1098 (D. Ariz. 1972).

¹¹ Accord, Fontenelle v. Omaha Tribe, 430 F.2d 143, 145-46 (8th Cir. 1970); Nicodemus v. Washington Water Power Co., 264 F.2d 614 (9th Cir. 1959) (privately owned public utility suing to condemn easement over Indian land); Okemah v. United States, 140 F.2d 963 (10th Cir. 1944) (condemnation of Indian land); Minnesota v. United States, 305 U.S. 382 (1939) (state condemnation of Indian land); Grant River Dam Authority v. Parker, 40 F. Supp. 82 (N.D. Okla. 1941). See, Spriggs v. McKay, 228 F.2d 31 (D.C. Cir. 1955) (dictum).

. . . against alienation". In a suit by the Indians, however, no present Indian property interest is lost if judgment is rendered for the defendants since the United States may subsequently assert the same interest in a separate action on behalf of the Indians; consequently, no governmental interest is affected. Jackson v. Sims, 201 F.2d 259, 262 (10th Cir. 1953).

This particular justification is clearly one of form only for should a private plaintiff successfully prosecute a suit against Indians, the United States would not be barred from instituting an independent suit to negate that judgment. Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 371 (1968). Consequently, no governmental interest is foreclosed by judgment against the Indians. While it is true that the government might suffer the inconvenience of instituting a second suit, this alone surely is not sufficient to distinguish suits against Indians from those brought by Indians.

Moreover, this rationale assumes that the government's only duty is to prevent alienation of property presently held by Indian tribes. Passamaquoddy indicates, however, that the government's duty is much broader, for that decision imposes a positive obligation "to investigate and take . . . action" to recover lands which are alleged to be within the scope of the Nonintercourse Act, 528 F.2d at 379. A judgment for a defendant in a suit to recover property brought by Indians post Passamaquoddy, therefore, impairs the fiduciary obligation owed the Indians to the same extent as a judgment for a private plaintiff divesting Indians of title. Passamaquoddy thus leaves no basis for

distinguishing, on this ground, suits brought by Indians from those brought against Indians.¹²

The second justification offered by the courts for refusing to join the United States in suits brought by the Indians was that Indian plaintiffs would be left without a remedy if the United States was found to be an indispensable party whose absence required dismissal. Choctaw and Chickasaw Nations v. Seitz, supra. Cf. Capitan Grande Bank of Mission Indians v. Helix Irrigation District, 514 F.2d 465, 470 (9th Cir. 1975) cert. denied 423 U.S. 874 (1976) ("Indian . . . tribes have no assurance that all their claims or even all their plainly reasonable claims . . . will be pursued . . . by the United States. Such assurance is precluded by . . . the inherently discretionary manner in which these responsibilities must be discharged.") The question as thus posed has been whether Indian tribes should be left potentially remediless so that defendants could be spared the risk of multiple suits. The equitable balance required by Rule 19(b)("[T]he court shall determine whether in equity and good conscience the action should proceed . . .") has been struck in favor of the Indians and their actions allowed to proceed without the United States.

Two recent decisions have provided Indian plaintiffs

¹²It might be argued that the government could always sue in its capacity as trustee to recover property after its Indian wards have been unsuccessful and that the government's obligation, therefore, has not been impaired. As noted above, however, the same rationale would allow the government to sue to set aside a prior judgment for the plaintiff in a suit against the Indians.

with adequate alternative remedies. The first is delineated by Passamaquoddy which allows Indian tribes to institute suit against the United States to compel action on their behalf. That decision imposed upon the government a broad and comprehensive fiduciary duty to act on behalf of tribes of Indians:

[T]he Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe . . . [c]learly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted . . .

528 F.2d at 379. The concomitant right of the beneficiary of the trust relationship, the Indians, to require action by the fiduciary to institute suit on its behalf provides the plaintiff a substantial remedy should this suit be dismissed for failure to join an indispensable party.

The case of Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973), provides the plaintiff the second alternative remedy. The court in that case held that, although the taking or extinguishment of aboriginal title by Congress was not a compensable interest under the Fifth Amendment, citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), Indian tribes had a cause of action for damages against the United States for a breach of its obligation to protect their aboriginal title from third party interference.

[U]ntil [Indian] possessory rights based on use and occupancy were extinguished by Congress, plaintiffs had a right to be protected by the sovereign against third-party intrusions. If . . . in fact disturbed in their use and occupancy by trespassers, i.e., by any parties

coming onto the land except for those
entering under Congressional authoriza-
tion, then there accrued a cause of action
. . . for breach of fiduciary duty . . .

369 F. Supp. 1359 at 1378-79.¹³ Note, Indian Title: The Rights
of American Natives in Lands They Have Occupied Since Time
Immemorial, 1975 Colum. L. Rev. 656, 685-86

The dismissal of this action for failure to join the
United States would not effect this right. A substantial damage
recovery against the government, if a breach is demonstrated,
should adequately compensate the plaintiff for any possessory
interest it might have held.

These alternative remedies require that the issue before
this Court be restated: should the plaintiff be made to compel
the government to sue on its behalf or be left to its damage
remedy against the United States so that the defendants might
be spared the burden of multiple suits. The fourth standard
set out in Rule 19(b) --- whether the plaintiff would have an
otherwise adequate remedy --- is no longer controlling. Rather,
the fact that the defendants might be subject to multiple suits,
and the inability of the court to fashion a remedy to mitigate
this risk, justify imposing upon the Indians the burden of first
seeking to join the United States or of pursuing their damage

¹³While the court in Edwardsen was dealing with an
affirmative breach by federal officers by authorizing third party
trespass, Passamaquoddy leaves no room for distinguishing a breach
of duty resulting from the failure to prevent or challenge
alienation.

claim. The balance has shifted. Equity and good conscience now favor the defendants. The United States should be held to be indispensable and dismissal should be required in its absence. The plaintiff should be left to its alternative remedies.

C. THE COMPLAINT SHOULD BE DISMISSED SINCE THE COMMONWEALTH OF MASSACHUSETTS IS AN INDISPENSABLE PARTY.

1. The Commonwealth Of Massachusetts Has Sufficient Interest In The Subject Matter Of This Action To Be Joined As A Party Plaintiff.

The final ground for the defendants' Motion to Dismiss is that the Commonwealth of Massachusetts ("Commonwealth") has such an interest in the subject matter of this action, should the plaintiff prevail, as to make it an indispensable party within the scope of Rule 19(a) and (b) whose nonjoinder requires dismissal of this action. The factual basis for this legal conclusion is the judicially recognized distinction between the property interest retained by the three original colonies in lands claimed by Indians and that same property interest as retained solely by the United States throughout the remainder of the country.

Although the scope of application of the Nonintercourse Act has been held to be the same for the thirteen colonies as for the other states, the interest retained by the original colonies, and, therefore, the Commonwealth differs:

It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all of the rest of the continental United States and that fee title to Indian lands in these States . . . was in the State . . .

Oneida Indian Nation of New York v. County of Oneida, 414 U.S.

61, 670 (1974). Compare, Edwardsen v. Morton, 369 F. Supp. 1359, 1371 (D.D.C. 1973) (fee to aboriginal lands in Alaska held by United States). There are in Mashpee, consequently, three different property interests which might be asserted as superior to those of the defendants. The plaintiff claims aboriginal title; the United States, the power to extinguish that possessory interest; and the Commonwealth could claim the remaining fee interest. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 146 (1810). U.S. Dept. of Interior, Federal Indian Law 599 (1958). If the plaintiff prevails here, the Commonwealth has a colorable claim that it retained a fee interest in the subject land when it ratified the Constitution, even though it thereby ceded its power to extinguish aboriginal title to the United States. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 146 (1810). It is a limited but very real property interest; for should the United States choose to extinguish that aboriginal title, as it clearly could, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), the Commonwealth could be held to possess a fee simple absolute. In order to accord the defendants complete relief, Fed. R. Civ. P. 19(a)(1), all those possible property interests arising from plaintiff's present claim of aboriginal title should be adjudicated in this action. This court should order that the Commonwealth be joined as a party plaintiff.

2. The Commonwealth Has Waived Its Sovereign Immunity In Actions To Quiet Title And Therefore Can Be Joined As A Party Defendant.

The compulsory joinder of the Commonwealth as a party defendant is permissible to the extent it is consistent with the Eleventh Amendment. Thus, should the Commonwealth not consent to joinder as a party plaintiff, it can only be ordered

to join as a party defendant if it has waived its sovereign immunity. See generally, Wright and Miller, Federal Practice and Procedure: Civil §1617. The Commonwealth has provided this necessary consent to suit by statute.

A civil action to recover freehold estates in fee simple, fee tail or for life may be prosecuted against the Commonwealth . . .

Mass. Gen. Laws c.237, §2.

By joining the Commonwealth, the defendants will seek to foreclose whatever fee interest it retained when it ceded its right to extinguish aboriginal title to the United States; Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 146 (1810). In effect, the defendants, through the liberal joinder provisions of the Federal Rules, seek to quiet title to the fee simple absolute they now claim under color of state law. Mass. Gen. Laws c.237, §2 expressly waives sovereign immunity in such a case and, thereby, empowers this Court to order joinder of the Commonwealth as a party defendant.

3. The Substantial Alternative Remedies Available To The Plaintiff Require That This Court Enter An Order of Dismissal If Joinder Of The Commonwealth Is Not Possible.

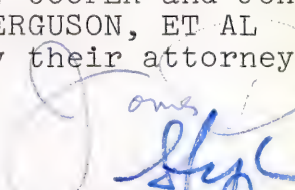
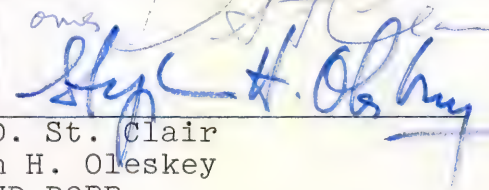
Should joinder of the Commonwealth for any reason not be possible, Rule 19(b) requires that this Court determine whether "in equity and good conscience" the Commonwealth should be designated an indispensable third party whose absence requires dismissal. The fundamental issue, again, is whether the plaintiff would have an otherwise adequate remedy if the Court dismissed

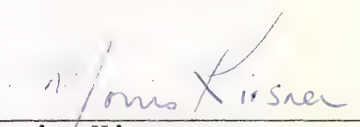
for nonjoinder. As was the case with the United States, the plaintiff has other substantial remedies which would not be foreclosed by dismissal. The plaintiff could exercise its Passamaquoddy right to compel suit by the United States; and could sue the United States for a breach of fiduciary duty, Edwardsen v. Morton, 369 F. Supp. 1359, 1371 (D.D.C. 1973). These remedies, available in any event, permit this Court, "in equity and good conscience" to dismiss this action if all those with potential interests contrary to that of the defendants are not joined. Because the Commonwealth might claim one of these superior interests, this action should not proceed in its absence.

III. CONCLUSION

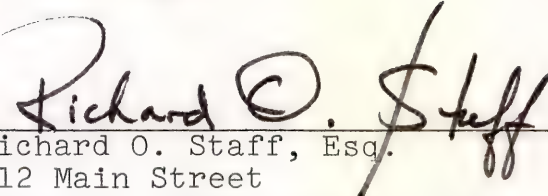
The defendants respectfully request that this Court grant their Motion to Dismiss as to all grounds.

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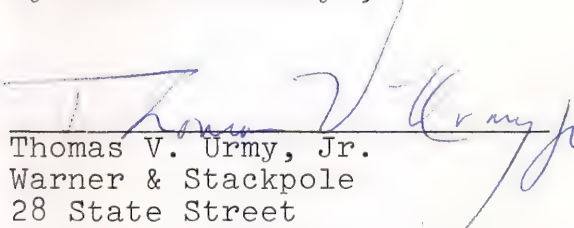

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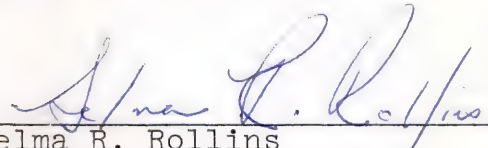


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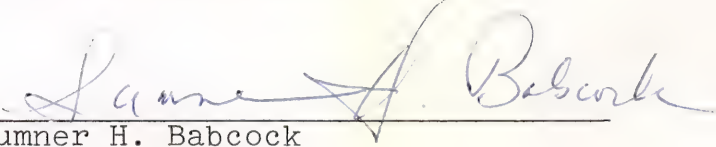
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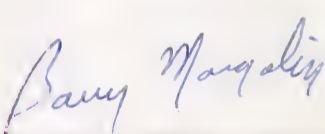
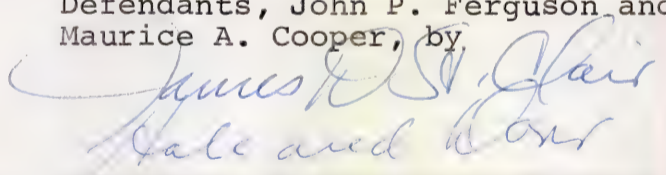
DOCKETED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,	:	
	:	
PLAINTIFF,	:	
	:	
v.	:	CIVIL ACTION NO. 76-3190-S
	:	
NEW SEABURY CORP., <u>et al.</u> ,	:	
	:	
DEFENDANTS.	:	

STIPULATION

Plaintiff Mashpee Tribe and defendants John D. Ferguson and Maurice A. Cooper, by their attorneys, hereby agree and stipulate to the addition of said John P. Ferguson and Maurice A. Cooper as parties defendant in the above entitled action and said defendants hereby appear in said action for all purposes and waive any objection as to lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process.

Plaintiff, Mashpee Tribe, by	Defendants, John P. Ferguson and Maurice A. Cooper, by
	
Barry A. Margolin	Hale & Dorr
Native American Rights Fund	28 State St.
364 Boylston St., 2nd floor	Boston, Mass. 02109
Boston, Mass. 02116	

CERTIFICATE OF SERVICE

I, Stephen H. Oleskey, one of the attorneys for the defendant Town of Mashpee, et al in the above matter, hereby certify that I have this day caused a copy of the foregoing Stipulation to add John D. Ferguson and Maurice A. Cooper as party defendants to be served upon the parties herein, by causing a copy of same to be mailed, postage prepaid to:

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Stephen H. Oleskey

OCT 22 2 55 PM '76

U.S. DISTRICT COURT
DISTRICT OF MASS.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,

Plaintiff,

VS.

NEW SEABURY CORP., ET ALS,

Defendants.

Civil Action

File No. 76-3190-S

ANSWER

DEFENDANTS DEMAND

JURY TRIAL

DOCKETED

Now comes defendant James A. McDonald, Jr. and as and for his answer to the complaint of the plaintiff in the above entitled action, states as follows:

(The paragraph numbers in this answer refer directly to and are in answer to the identical numbered paragraphs of the complaint in this case.)

1. Denied.

2. Denied.

3. Denied.

4. The defendant is without sufficient knowledge or information to form a belief as to the truth of the allegation contained therein.

5. Denied.

6. Denied.

7 through 11, inclusive. The defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained therein.

12. Denied.

13 through 15, inclusive. The defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained therein.

16. Denied.

17. The defendant is without sufficient knowledge or information to form a belief as to the truth of the allegation contained therein.

18. Denied.

19. The defendant is without sufficient knowledge or information to form a belief as to the truth of the allegation contained therein.

20 through 111, inclusive. The defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained therein except defendant admits that paragraph #67 does describe land owned by him.

112. Denied.

FIRST DEFENSE

The complaint fails to state a cause of action against the defendant, James A. McDonald, Jr.

SECOND DEFENSE

Plaintiff lacks standing to bring this action because if the Mashpee Tribe is an indian tribe as that term was used and employed at times material to the events alleged in the complaint, then such tribe is a ward of the United States of America and redress for damages, if any, must be sought by petition by the United States of America.

THIRD DEFENSE

The Court does not have subject matter jurisdiction and the plaintiff has not satisfied the statutory and other rules and laws referable to the conditions precedent to the commencing of a class action.

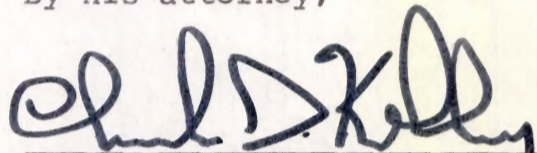
FOURTH DEFENSE

The plaintiff has failed to bring this action against defendant James A. McDonald, Jr. within the time provided by the applicable statute of limitations or within a reasonable period of time after the cause of action arose and accordingly this action is barred.

WHEREFORE, defendant respectfully requests that the complaint be dismissed as to defendant James A. McDonald, Jr. and that the defendant be awarded its costs and that this Court award such other and further relief as it deems just and proper under the circumstances.

Dated: Malden, Mass.
October 21, 1976

JAMES A. MC DONALD, JR.
By his attorney,

A handwritten signature in dark ink, appearing to read "Charles D. Kelley", written over a horizontal line.

CHARLES D. KELLEY
585 PLEASANT STREET
MALDEN, MASSACHUSETTS 02148
322-1918

FOUR STAR BOND

SOUTHWORTH CO. U.S.A.

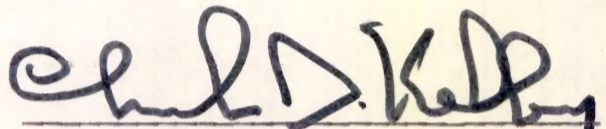
25% COTTON FIBER

CERTIFICATE OF SERVICE

I, Charles D. Kelley, attorney for said defendant, hereby certify that on October 21, 1976, I served a copy of the within Answer upon plaintiff's counsel:

Barry A. Margolin, Esq.
Native American Rights Fund
364 Boylston Street (2nd fl.)
Boston, Massachusetts 02116

by mailing, first class mail, postage prepaid, on said date copy of same to him.



CHARLES D. KELLEY

Dated: October 21, 1976